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92-438
No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, *et al.*,

Petitioners,

-against-

CHARLES BROWN and JAMES WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether appellate review of a stayed remand order is proper under *Carnegie-Mellon v. Cohill*, where the district court did not find a complete lack of subject matter jurisdiction initially and remanded only a small part of the case originally removed, consistent with § 1447(d), which generally bars appellate review of an order remanding a *case* which was *removed* without subject matter jurisdiction?

2. Whether, when a district court has certified a remand order for appeal pursuant to § 1292(b), any conflict between the grant of appellate jurisdiction in § 1292(b) and the denial of appellate jurisdiction in § 1447(d) should be resolved by permitting § 1292(b) review of remand orders, so as to achieve Congress' purpose in enacting both statutes: avoiding delay in litigation?

3. Whether those remand orders which are reviewable consistent with § 1447(d) are properly reviewed by certification pursuant to § 1292(b), by appeal under the collateral order doctrine, or by mandamus?

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PARTIES BELOW

The parties to the proceeding below, as required by Supreme Court Rules 14.1(b) and 29.1 are listed in the following footnote.[1]

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[1]Charles Brown and James White, individually and as representative of the Estate of Clarence White, respondents.

The Dow Chemical Company, petitioner. The parent companies and subsidiaries (except wholly owned subsidiaries) of the Dow Chemical Company are as follows:

> Marion Merrell Dow, Inc., Gruppo Lepetit S.p.A., Destec Energy, Inc.

Diamond Shamrock Chemicals Company, petitioner. The parent companies and subsidiaries (except wholly owned subsidiaries) of Diamond Shamrock Chemicals Company are:

> Oxy-Diamond Alkali Corporation, Occidental Chemical Corporation, Occidental Petroleum Corporation.

Hercules Incorporated, petitioner. The parent companies and subsidiaries (except wholly owned subsidiaries) of Hercules Incorporated are:

> Australian Chemical Holdings Limited

Monsanto Company, petitioner. The parent companies and subsidiaries (except wholly owned subsidiaries) of Monsanto Company are:

> Sourthwall Technologies, Inc., Macneil-Schwendler Corp., Micro General Corp., WEITEK Corporation, Dara Pharmaceutical, Gensia Pharmaceuticals, Biotechnology Development Corporation.

T. H. Agriculture & Nutrition Company, Inc., petitioner. The parent companies and subsidiaries (except wholly owned sub-

sidiaries) of T. H. Agriculture & Nutrition Company are as follows:

North American Philips Corporation

Uniroyal, Inc., a corporation dissolved pursuant to the laws of the State of New Jersey, petitioner. The parent companies and subsidiaries (except wholly owned subsidiaries) of Uniroyal, Inc. are as follows:

CDU Holdings, Inc.

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No. 92-

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, *et al.*,

Petitioners.

v.

CHARLES BROWN and JAMES WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

Petitioners The Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T. H. Agriculture and Nutrition Company, Inc. and Uniroyal, Inc. respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in *Ryan v. Dow Chemical Co.* on June 8, 1992 and *Ivy v. Diamond Shamrock Chemicals Co.* on June 16, 1992.

OPINIONS BELOW

The order of the court of appeals filed May 8, 1992 denying petitioners' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is reprinted in the Appendix at A1.

The order of the court of appeals filed June 8, 1992 denying petitioners' motion for reargument and recall and modification of mandate regarding the court's May 8, 1992 order is reprinted in the Appendix at A4.

The order of the court of appeals filed June 16, 1992 granting respondent Brown's motion to dismiss petitioners' appeal is reprinted in the Appendix at A7.

The order of the district court dated March 30, 1992 adhering to its January 29, 1992 decision following reargument is reprinted in the Appendix at A10.

The order of the district court dated February 7, 1992 deferring certification pending reargument of its January 29, 1992 decision is reprinted in the Appendix at A12.

The order of the district court dated January 29, 1992 remanding respondents' claims, staying remand, and certifying the order for immediate appeal pursuant to § 1292(b) is published at 781 F.Supp. 934 (E.D.N.Y.1992) and is reprinted in the Appendix at A14.

The order of the district court dated October 4, 1991, as amended November 15, 1991, finding federal jurisdiction over plaintiffs who were members of a

previously certified class and dismissing their claims and severing the claims of respondents is published at 781 F.Supp. 902 (E.D.N.Y.1991) and is reprinted in the Appendix at A58.

JURISDICTION

The order of the court of appeals denying petitioners' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) was entered on May 8, 1992. The order of the court of appeals denying petitioners' motion for reargument and recall and modification of mandate of the court's May 8, 1992 order was entered on June 8, 1992. The order of the court of appeals granting respondent Brown's motion to dismiss petitioners' appeal was entered on June 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES

Section 1292(b) of Title 28 of the United States Code appears in the Appendix at A149.

Sections 1447(c) and (d) of Title 28 of the United States Code appear in the Appendix at A149–150.

STATEMENT OF THE CASE

In May 1989, thirty-four plaintiffs sued petitioners in Texas state court, alleging damages resulting from the government's use of the herbicide Agent Orange for defoliation of jungle vegetation to protect troops from hostile forces during the Vietnam War. Petitioners are herbicide manufacturers who supplied Agent Orange to the government. Petitioners removed the case to federal court. Like hundreds of

earlier such cases filed throughout the country since 1979, the case was then transferred to the Eastern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 as part of M.D.L. No. 381.

During earlier proceedings in M.D.L. 381 in 1984, petitioners entered into a settlement with a class of plaintiff veterans and family members (the "Agent Orange class"). The United States Court of Appeals for the Second Circuit affirmed the fairness of the settlement, characterizing it as "essentially a payment of nuisance value" that was fair because "the plaintiffs' case was so weak as to be virtually baseless." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir.1987), *cert. denied sub nom. Pinkey v. Dow Chemical Co.*, 484 U.S. 1004 (1988). *See* A61–85 (history of Agent Orange litigation). All but two of the thirty-four original plaintiffs in the present litigation were veterans and their family members (the "veteran plaintiffs") and thus were part of the Agent Orange class. The remaining two plaintiffs were civilians and so were not members of the Agent Orange class. These two plaintiffs are the respondents here (the "civilian respondents").

Plaintiffs moved to remand to state court. On October 4, 1991, the District Court found federal subject matter jurisdiction over the veteran plaintiffs and denied their motion to remand. A85–96.. Characterizing the suit as "a direct challenge to the validity of the settlement and the programs now financed by the Settlement Fund," *Id.* at A78–79, the court dismissed the veteran plaintiffs' claims on grounds that they were members of the Agent Orange class and so were bound by the prior settlement. *Id.* at A96. The veteran plaintiffs have ap-

pealed that decision to the Court of Appeals for the Second Circuit. With respect to the civilian respondents, the District Court stated:

> The two civilian plaintiffs...are in a separate category. They are not members of the class and are therefore not bound by the Settlement Agreement. Their cases are severed from the claims of the remaining plaintiffs. The question of the court's jurisdiction over these plaintiffs will be addressed in a separate memorandum.

A86.

Petitioners opposed remand of the civilian respondents on grounds that petitioners were "acting under" federal officials, and so had a right to have their federal defenses decided in a federal forum under 28 U.S.C. § 1442(a)(1). In a second opinion dated January 29, 1992, addressing remand of the civilian respondents, the District Court acknowledged that petitioners had been "compelled under threat of criminal sanction to deliver Agent Orange produced according to government specifications to the Defense Department." A49. The Court nevertheless concluded that, while it was a "close question," petitioners had "not met the requirements of § 1442(a)(1)." A50. Since there was no other basis for subject matter jurisdiction over respondents after severance, the court remanded their actions to state court. A56. Finding that its decision raised close and important questions of law, and that an immediate appeal might speed conclusion of the litigation, the court certified its order for appeal under 28 U.S.C. § 1292(b). *Id.* The order of remand was stayed "pending completion of appeals." A57.

Relying on recent decisions of the courts of appeals, the court decided that 28 U.S.C. § 1447(d) did not bar appellate review by § 1292(b) certification of its stayed remand order. A54. The Court explained that lack of appellate review would be:

> an unfortunate result given the closeness of the case and the particular provision under which removal is sought. 28 U.S.C. § 1442, after all, is premised on the need for the federal courts to protect federal interests from possible state interference. In light of this concern, it would be useful for the parties and the district courts in this Circuit to have an authoritative pronouncement from the Court of Appeals, which has not yet had occasion to consider the "person acting under" provisions of section 1442(a)(1).

A55. The court stressed that the certified question "controls the extent of federal subject matter jurisdiction in this and like cases where important federal interests may be at stake." A56. After postponing certification to allow reargument, A12, the District Court adhered to its prior decision in a brief memorandum and order dated March 30, 1992. A10.

Petitioners filed a timely petition for permission to appeal pursuant to § 1292(b). In light of conflicting authority regarding the proper avenue for review of remand orders, petitioners indicated in that petition their intention to seek review by appeal and mandamus, as well as by § 1292(b) certification. On May 8, 1992, the Court of Appeals for the Second Circuit denied petitioners' petition for permission to appeal,

stating: "See *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 343 (1976)." A3. Petitioners filed a timely motion for reconsideration and for recall and modification of mandate, which was denied on the merits by an order entered June 8, 1992. A4.

Petitioners filed a notice of appeal dated April 29, 1992, intending to file a single brief both in support of that appeal and, in the alternative, as a petition for a writ of mandamus. Respondent Brown filed a motion to dismiss the appeal, which the Court of Appeals granted by order dated June 16, 1992. At oral argument of the motion to dismiss, at which respondents did not appear, members of the panel of the Court of Appeals stated that mandamus would also be denied and so a formal petition for mandamus was not filed.

Petitioners ask the Court to review by writ of certiorari whether there is appellate jurisdiction to review the District Court's stayed remand order consistent with § 1447(d) and, if so, whether such jurisdiction is properly exercised by certification pursuant to § 1292(b), appeal as a collateral order, or mandamus. Upon a finding that appellate jurisdiction exists, petitioners request that the Court remand to the Court of Appeals for the Second Circuit for further proceedings so that the underlying question of subject matter jurisdiction under § 1442 may be reviewed on the merits.

I.

THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE SCOPE OF THE *THERMTRON* AND *CARNEGIE-MELLON* EXCEPTIONS TO §1447(d).

In denying petitioners' § 1292(b) petition for permission to appeal, the Court of Appeals simply cited *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). A3. At the page cited, this Court stated that "section [1447(d)] prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ." 423 U.S. at 343. However, the Court in *Thermtron* emphasized that the seemingly broad language of § 1447(d) was not in fact an absolute bar to review of all remand orders: "only remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)." 423 U.S. at 346 (1976). The Court found that an order remanding because a trial could be held more quickly in state court was not issued under § 1447(c), and so appellate review was not barred by § 1447(d). In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), the Court further limited the scope of § 1447(d), exercising appellate jurisdiction to review an order remanding pendent state claims to state court after the plaintiffs withdrew their only federal claim. Both the majority and dissenters in *Carnegie-Mellon* agreed that such a remand was not pursuant to § 1447(c). *See* 484 U.S. at 355 n. 11, 357. Thus, § 1447(d) did not bar review.

Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit recently addressed

the scope of the *Thermtron* and *Carnegie-Mellon* exceptions to § 1447(d) in *In re Shell Oil Co.*, 966 F.2d 1140 (7th Cir.1992), and *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir.1992). While conceding that "a straightforward reading of § 1447(d)" would seem to bar review of remand orders, Judge Easterbrook stated that "[s]traightforward is about the last word judges attach to § 1447(d) these days..." *In re Amoco*, 964 F.2d at 708. After summarizing the Seventh Circuit's understanding that *Thermtrom* and *Carnegie-Mellon* create three different categories of remands, each governed by a different standard of review, Judge Easterbrook observed:

> Figuring out which remands fall into which categories is a difficult task, as a series of our cases illustrates. Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principle justification for § 1447(d).

Id. (citations omitted). Other courts of appeals have approached this "difficult task" in different ways, giving conflicting readings to § 1447(d). *See* pp.15–17, *infra*.

The Second Circuit's decision below represents a perhaps understandable attempt to avoid such difficulties entirely by retreating to the "straightforward reading" of § 1447(d) rejected by the Seventh Circuit. In summarily denying review based on § 1447(d), the Second Circuit apparently thought that, because the remand order found a lack of subject matter jurisdiction, the remand was automatically within the scope of § 1447(c) and review was barred by § 1447(d). This interpretation is no longer viable after *Carnegie-*

Mellon and conflicts with several decisions in the Courts of Appeals for the Seventh, Fifth, Fourth, and Third Circuits, which have in a variety of circumstances found appellate jurisdiction to review remand orders despite a district court's finding of lack of subject matter jurisdiction.

A. Section § 1447(d) only bars appellate review of remands of an entire "case" because subject matter jurisdiction was lacking at the outset.

The remand order in *Carnegie-Mellon* did not fall within the scope of § 1447(c) (and thus was reviewable notwithstanding § 1447(d)) because the case had been properly removed at the outset. Remand was based on a subsequent event: the plaintiffs' withdrawal of their sole federal claim, after discovering that it was precluded for failure to file a timely administrative claim. 484 U.S. at 357.

This Court "has consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S.Ct. 858, 860 (1991) (per curiam). This principle applies both when jurisdiction is based on the presence of diversity, *see id.* ("diversity jurisdiction is to be assessed at the time the lawsuit is commenced"); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938) ("events occurring subsequent to removal ... do not oust the district court's [diversity] jurisdiction"), and when jurisdiction is based on federal claims, *see Carnegie-Mellon*, 484 U.S. at 348–351; *Rosado v. Wyman*, 397 U.S. 397, 403–405 (1970) (court had discretion to decide pendent claims after the federal jurisdiction-conferring claim became moot). *See also Massachusetts v. V & M Management, Inc.*, 929

F.2d 830, 834 (1st Cir.1991) ("Once a case is properly removed, a district court has jurisdiction over the entire case, whether or not the basis for removal, *i.e.* the federal claim, thereafter remains.").

The history of §§ 1447(c) and (d), set forth in *Thermtron*, 423 U. S. at 346 – 352, confirms that § 1447(c) only authorizes remand for cases which were improperly removed at the outset. The predecessors of § 1447(c) specifically granted remand authority only for cases "improperly removed." 423 U.S. at 347–48. *Thermtron* indicated that § 1447(c) was inapplicable where the case was "properly removed," and framed the relevant question for purposes of § 1447(c) as "whether the District Court would have had jurisdiction of the case had it been filed *initially* in that court." *Id.* at 344 (emphasis supplied).

This reading of *Thermtron* and *Carnegie-Mellon* is confirmed by *In re Shell Oil Co.*, 966 F.2d 706 (7th Cir.1992), and *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir.1992). Judge Easterbrook found that "the traditional view...that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts" continued unaltered in the current version of § 1447(c). *In re Shell*, 966 F.2d at 1133. Thus, the reviewability of remands for lack of subject matter jurisdiction turned on "whether the district court remanded the case because in its view jurisdiction was missing at the time of removal or because of later events." *Id.* This conclusion was based squarely on *Carnegie-Mellon:* "we understand *Carnegie-Mellon* to permit review when the district judge believes that removal was proper and that later developments authorize remand." *In re Amoco*, 964 F.2d at 708.

In *In re Amoco*, the court of appeals found that the district court "believed that so long as the union was a plaintiff, there was federal question jurisdiction, which vanished when the union dropped out." *Id.* Even though the district court remanded for lack of subject matter jurisdiction, that remand was not pursuant to § 1447(c), since the case had not been *removed* without jurisdiction. Thus, appellate review was not barred by § 1447(d).

As in *Amoco*, the district court here found the initial removal of the case proper. The court found federal jurisdiction over the veteran plaintiffs and dismissed their claims, which constituted the bulk of the case. Because the initial removal was proper, the court had jurisdiction over the entire case, including the pendent civilian respondents. Only after a discretionary midstream restructuring of the case by severance of the respondents (equivalent for jurisdictional purposes to the substitution of parties in *Amoco* and the withdrawal of federal claims in *Carnegie-Mellon)* did the district court find a lack of subject matter jurisdiction and issue its remand order. Accordingly, under *Carnegie-Mellon* and *Amoco*, the remand here was not pursuant to § 1447(c), and appellate review is not barred by § 1447(d).

The fact that only a part of the case originally removed was later remanded provides an important additional reason that the remand here falls outside the scope of § 1447(c) and § 1447(d). Those sections by their terms apply only to remand of a "case," not to remand of individual claims or parties. Here, some thirty-four plaintiffs—thirty-two plaintiff veterans and two respondent civilians—elected to join their claims in a single case. Upon removal, the District Court found jurisdiction over the veteran plaintiffs

and dismissed their claims. It severed the two respondent civilians *sua sponte* for discretionary reasons, and only then found no independent ground for federal jurisdiction over respondents and remanded. The two respondent civilian actions that were remanded were not the "case" which was originally removed, but only a small part of it. The District Court's order was not "[a]n order remanding a *case* to the State court from which *it* was removed," and thus was not within the terms of § 1447(d) (emphasis supplied).

A comparison of § 1447(d) with 28 U.S.C. § 1452(b), the analogous provision applicable to bankruptcy cases, makes clear that Congress knew how to bar appellate review of remands of less than an entire case when it chose to do so. Section § 1452(b) permits remand of an individual "claim or cause of action" and specifically bars appellate review of remands of such individual claims or causes of action. In contrast to the bankruptcy provision, § 1447(d) plainly bars review only of remands of the whole "case" which was removed.

Consideration of the purpose of § 1447(d) reinforces the conclusion that Congress intended only to bar appellate review when an entire case was found not properly removed and so was remanded to state court. *Thermtron* states that Congress intended § 1447(d) "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." 423 U.S. at 351. When the entire case is remanded, a bar on appellate review will achieve the simplicity and finality which Congress sought. The case will proceed in state court.

But when only part of the case is remanded, the case may go forward in both federal and state court. A bar on review would instead create complexity and uncertainty. The potential for conflict between federal and state courts would be increased, not eliminated. Litigants would struggle to have issues decided first in the forums where their prospects seemed best and to bind one forum to rulings of the other. Inconsistent rulings would inevitably occur. The federal portion of the case and the grounds for dividing the case could eventually be reviewed on appeal, and any modification on appeal would trigger further litigation over forum.

This litigation offers a clear example of how applying the § 1447(d) bar on appellate review to a remand order which splits a case between the federal and state court systems would frustrate Congress' goals of simplicity and finality. Petitioners will raise their argument for federal jurisdiction under 28 U.S. § 1442—which the District Court found to be a close question—in opposition to the veteran plaintiffs' appeal now pending before the Court of Appeals. Since the issue of jurisdiction under § 1442 will be before the Court of Appeals in any event, it makes no sense to bar review as to respondents, creating the possibility of inconsistent results and renewed litigation of the forum issue.

Accordingly, the decision of the Second Circuit below conflicts with this Court's decision in *Carnegie-Mellon*, the Seventh Circuit's decisions in *In re Amoco* and *In re Shell*, and the plain text of § 1447(d), which bars appellate review only of an entire "case" which is *initially* improperly removed, and a writ of certiorari should be granted.

B. Other courts of appeals have reached conflicting decisions based on differing readings of *Thermtron*, *Carnegie-Mellon*, and § 1447(d).

There is little consistency in result or in reasoning among the various courts of appeals in determining the scope of the exceptions to § 1447(d) created by *Thermtron* and *Carnegie-Mellon*. For example, the Court of Appeals for the Eleventh Circuit, like the Second Circuit here, persists in giving § 1447(d) the "straightforward reading" rejected by the Seventh Circuit. *See, e.g., Bregman v. Alderman*, 955 F.2d 660 (11th Cir.1992); *Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir.1991). These decisions rely on an expansive reading of *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam), which declined to create an implied exception to the § 1447(d) bar on appellate review for remand orders which are clearly erroneous.

The Court of Appeals for the Fourth Circuit understands *Thermtron* to have created an exception to § 1447(d) allowing appellate review of remand orders which "represent[] a discretionary decision by the district court not to hear a certain case on grounds of public policy." *Kolibash v. Committee on Legal Ethics of the West Virginia Bar*, 872 F.2d 571, 573 (4th Cir.1989). *See also In re International Paper Co.*, ___ F.2d ___, 1992 WL 100487 (5th Cir. June 1, 1992) (vacating order remanding "in the spirit of federalism" to allow a state court to apply a state statute). Significantly, while the district court in *Kolibash* justified its remand in terms of discretionary policy considerations, it also found that subject matter jurisdiction was lacking. The court specifically concluded that the defendant did not have a "right" under § 1442 to "an adjudication of the proceeding...in a

federal court." *In re Kolibash*, CA No. 2:87-0444, slip op. at 5 (S.D. W. Va. April 21, 1988).

In *Hays County Guardian v. Supple*, 1992 U.S. App. Lexis 18167 (5th Cir. August 10, 1992), the Court of Appeals for the Fifth Circuit found that § 1447(d) did not bar review of a district court order remanding various state law claims—some for lack of jurisdiction under the Eleventh Amendment and some on discretionary grounds. While the result in *Hays* is consistent with *Carnegie-Mellon* and *In re Amoco*, the Fifth Circuit's reasoning is completely different. The Fifth Circuit relied on the seemingly incidental fact that the district court had decided all the issues in a single final judgment. Observing that § 1447(c) only mandates remand for lack of subject matter jurisdiction "at any time before final judgment," the court decided that a remand for lack of jurisdiction included *in* a final judgment was not "before" final judgment. 922 U.S. App. Lexis 18167, at *15 (5th Cir.). Thus, the remand was not within the scope of § 1447(c), and § 1447(d) did not apply to bar review. *See also In re Carter*, 618 F.2d 1093, 1098–99 (5th Cir.1980) (same), *cert. denied sub nom. Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949 (1981).

In *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838–848 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Util. Corp.*, 112 S.Ct. 1962 (1992), the Court of Appeals for the Third Circuit found that an order remanding for lack of subject matter jurisdiction could be reviewed on certification pursuant to § 1292(b). The remand in *In re TMI* was based on a finding that the jurisdictional statute at issue was unconstitutional. After careful consideration, the court concluded that Congress intended to bar review of remands based on "routine subject matter jurisdiction

determinations," but not on "an unsettled question of constitutional proportions." 940 F.2d at 848.

The underlying statute here, 28 U.S.C. § 1442(a)(1), is "an incident of federal supremacy," intended by Congress to protect federal officials, and persons acting under them, from potentially hostile state courts. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Petitioners supplied the United States military with a weapon for use in an unpopular war and have raised important federal defenses: immunity under the Defense Production Act and the government contractor defense. As in *In re TMI*, petitioners' right to a federal forum in such circumstances is surely not the sort of routine jurisdictional determination which Congress intended to insulate from review.

The importance of the underlying jurisdictional question, combined with the importance of the appellate issues in and of themselves and the conflicting decisions of the courts of appeals, fully warrants the grant of certiorari.

II.
THE GRANT OF APPELLATE JURISDICTION IN § 1292(b) OVERRIDES § 1447(d).

Section 1292(b) affirmatively grants the courts of appeals discretion to permit appellate jurisdiction over orders within its terms which would otherwise be unappealable by statute. While § 1447(d) bars appellate review of remand orders issued pursuant to § 1447(c), the District Court here made the required findings under § 1292(b). Thus, the two federal statutes seem, at least superficially, to be in conflict: one granting discretion to permit appeal of an other-

wise unappealable order, and the other denying appellate jurisdiction.

The District Court observed that § 1292(b) was passed subsequently to § 1447(d) and considered the "contrary view[s]" of the courts of appeals as to whether § 1292(b) was "intended to modify or supersede [§ 1447(d)]." A55–56, *citing In re TMI Litig. Cases Consol. II.* 940 F.2d at 838-48 (review of remand for lack of subject matter jurisdiction under § 1292(b) proper when remand order stayed); *National Audubon Soc'y v. Department of Water,* 869 F.2d 1196, 1205 (9th Cir.1988) (review under § 1292(b) of remand order); and *In re Bear River Drainage Dist.,* 267 F.2d 849 (10th Cir.1959) (declining to review remand on certification). Persuaded to follow the "more recent authority" from the Third and Ninth Circuits, the District Court resolved the conflict in favor of § 1292(b), allowing review on certification where the order of remand is stayed pending an immediate appeal. A56. However, the Court of Appeals for the Second Circuit, without explanation, instead gave precedence to § 1447(d) and denied review for lack of appellate jurisdiction.

Following the District Court's decision, the Supreme Court denied certiorari in *In re TMI,* 940 F.2d 832, (3rd Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Util. Corp.,* 112 S.Ct. 1962 (1992). Then, in *Krangel v. General Dynamics Corp.,* 1992 WL 148151 (9th Cir. July 1, 1992) (per curiam), a panel of the Ninth Circuit distinguished *In re TMI* and *National Audubon* and declined to review under § 1292(b) an order remanding for lack of jurisdiction. *Krangel* simply rejected the district court's conclusion that "an exception to section § 1447(d) should be made for orders deciding important legal issues for

the first time," and did not consider whether Congress intended § 1292 (b) to modify or supersede § 1447(d). 1992 WL 148151, at *2 (9th Cir.).

This Court's prior decisions involving the two statutes do not definitively resolve the question, because the Court has described the scope of both statutes in expansive terms in isolation and has never been presented with a situation where they have appeared to be in conflict. The Court's recent decision in *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146 (1992), provides perhaps the closest analogy to the present situation and solidly supports giving precedence to § 1292(b) over § 1447(d) to the extent that the statutes conflict. *Connecticut National Bank* reversed the Second Circuit's determination that § 158(a) of the Bankruptcy Code limited the scope of § 1292(b), stating that "nowhere else, whether in § 158(d) *or any other statute*, has Congress indicated that the unadorned words of § 1292 are in some way limited by implication." *Id.* at 1150 (emphasis supplied). *See also Chappell & Co. v. Frankel*, 367 F.2d 197, 204 (2d Cir.1966) (in Banc) (§ 1292(b) "explicitly grants to the courts of appeals discretion to review *any* interlocutory order" within its terms) (emphasis supplied).

The canon of statutory construction which would give precedence to a "specific" over a "general" statute in the event of a conflict also supports allowing appellate review under § 1292(b). If read literally, § 1447(d) is very broadly worded and would seemingly apply generally to all remand orders. In contrast, § 1292(b) provides detailed procedures and specific criteria for permitting an appeal of an otherwise unappealable order.

In any event, the purposes of the two statutes provide "the best test of the meaning of the words chosen." *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir.1959) (L. Hand, J.). Here, the purpose of both § 1292(b) and § 1447(d) is the same: avoiding unnecessary delay in litigation. In *Thermtron*, the Court stated that Congress intended § 1447(d) to "prevent delay." 423 U.S. at 351. To the same effect, § 1292(b) only permits appeals of otherwise unappealable orders if "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Viewed in terms of their common purpose, the conflict disappears. Otherwise unappealable orders are only appealable under § 1292(b) when review may prevent delay, consistent with the purpose of § 1447 (d). The two statutes can be harmonized, and the purposes of both realized, by allowing review of remand orders under § 1292(b). On the other hand, a literalistic reading of § 1447(d) would not only violate the literal terms of § 1292(b) but would also defeat the purpose of both statutes by barring review in situations such as the present where review would speed rather than delay litigation. A56 (federal forum preferrable because of the years of prior proceedings and discovery in M.D.L. No. 381). Accordingly, the Court should grant certiorari to resolve the apparent conflict between § 1292(b) and § 1447(d) and the conflicting decisions of the Court of Appeals.

III.
THE COURTS OF APPEAL ARE IN CONFLICT AS TO THE PROPER PROCEDURE FOR APPELLATE REVIEW.

In those cases where § 1447(d) does not bar review, this Court and the courts of appeals have divided on the proper avenue for appellate review of remand orders. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (mandamus); *In re Amoco*, 964 F.2d 706, 713 (7th Cir.1992) (mandamus only); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838–848 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Util. Corp.*, 112 S.Ct. 1962 (1992) (certification pursuant to § 1292(b)); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir.1991) (mandamus in some circumstances, appealable collateral order in others); *Karl Koch Erecting Co., Inc. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658–59 (2d Cir.1988) (appealable collateral order); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir.1988) (appealable collateral order); *Cf. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 11–13 (1983) (stay of federal proceeding pending resolution of state suit held appealable collateral order).

Because of these conflicting precedents, petitioners seek review under each possible avenue: certification under § 1292(b), appeal under the collateral order doctrine, and mandamus. The appellants in *In re TMI* also felt constrained to seek review by all three routes. 940 F.2d at 838, 848. The conflicting decisions of the courts of appeals—and the wasted efforts of the parties and the courts in dealing with such uncertainty—provide strong evidence of the need for review in this Court. Since petitioners here seek

review under all three possible routes, the Court will have the opportunity to consider all aspects of the question and resolve these conflicts and uncertainties in a comprehensive decision.

In *Thermtron*, the Court held that review by mandamus was proper to compel a district court to decide a case which it had improperly remanded on grounds of its crowded docket. 423 U.S. at 352–53. *Thermtron* stated that "an order remanding a removed action does not represent a final judgment reviewable by appeal." *Id., citing Railroad Co. v. Wiswall*, 90 U.S. 507, 508 (1875). Subsequently, in *Moses Cone*, the Court reaffirmed the collateral order doctrine and found that a stay whose "sole purpose and effect...are precisely to surrender jurisdiction of a federal suit to a state court" was an appealable collateral order. *Moses Cone*, 460 U.S. at 10–11 n. 11.

In the years since *Moses Cone*, several courts of appeals have found that remand orders based on forum selection clauses, waiver of right to remove, nonarbitrability and abstention are not within the scope of § 1447(d) and are reviewable on appeal as collateral orders, rather than by mandamus. *See, e.g., Bennett v. Liberty Nat'l Fire Ins. Co.*, 1992 WL 150985 (9th Cir. July 6, 1992); *Milk 'n' More, Inc. v. Beavert*, 963 F.2d 1342 (10th Cir.1991); *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir.1991); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.1991) *cert. denied*, 112 S.Ct. 302; *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193 (6th Cir.1990); *Karl Koch Erecting Co., Inc. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658–59 (2d Cir.1988); *Clorox Co. v. U.S. Dist. Court for the N. District of California*, 779 F.2d 517 (9th

Cir.1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir.1984).

Other courts of appeals have read *Thermtron* to mean that review of remand orders is available exclusively by mandamus. *See, e.g., In re Amoco*, 964 F.2d 706, 714 (7th Cir.1992) ("It is mandamus or nothing"); *Melahn v. Pennock Ins. Co.*, 965 F.2d 1497 (8th Cir.1992); *Massachusetts v. V & M Management, Inc.*, 929 F.2d 830, 833–34 (1st Cir.1991).

In *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2d Cir.1988), the court reluctantly found that a remand based on abstention could be reviewed only by mandamus, not as a collateral order, distinguishing its earlier decision in *Karl Koch*. The court was persuaded by the reasoning of *Moses Cone*, but felt constrained by *Thermtron:*

> Though it is by no means clear why an order that remands an action to state court is any less final than the stay discussed in *Moses Cone*, the ruling in *Thermtron* that a remand order is not reviewable on appeal could not have been more explicit. Under the surrender-of-federal jurisdiction test used in *Moses Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order (*i.e.*, one whose review is not barred by § 1447(d)) is not reviewable by direct appeal.

842 F.2d at 34. The Fifth Circuit considered the question at length in *McDermott, supra*, and concluded that *Corcoran* was "wrongly decided." *McDermott*, 944 F.2d at 1203 n. 5. In *In re Amoco*, 964 F.2d at 712–13, the Seventh Circuit rejected *McDermott's* reason-

ing as contrary to *Lauro Lines s.l.r. v. Chasser*, 490 U.S. 495 (1989). However, the Tenth Circuit has continued to follow the *Pelleport/Karl Koch* line of cases, concluding that *Lauro Lines* is not controlling. *Milk 'n' More*, 963 F.2d at 1345. The need for this Court to grant certiorari to resolve the matter is clear.

Against the backdrop of the debate over whether remands are to be treated as final judgments under the collateral order doctrine, the feasibility and advantages of certification under § 1292(b) stand out clearly. *Thermtron* reviewed a remand order by mandamus rather than appeal because it was not a final judgment. The district court had not certified its remand order for appeal, so review under § 1292(b) was obviously impossible and was not considered. Section 1292(b) explicitly allows review of nonfinal interlocutory orders. Thus, when review of a remand order is not precluded by § 1447(d), review by certification under § 1292(b) is permissible, consistent with *Thermtron*, and with the other cases above cited. The Third Circuit, given the option of reviewing a remand order under each of the three possible routes, chose § 1292(b) and found it unnecessary to consider the availability of review as a collateral order or by mandamus. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 848 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Util. Corp.*, 112 S.Ct. 1962 (1992).

Certification under § 1292(b) will allow uniform appellate review of difficult and important questions of federal jurisdiction—such as those here and in *In re TMI*—whether the district court remands or finds federal jurisdiction. Review by certification is available only at the discretion of the courts, not as a matter of right for litigants. While virtually any interlocutory order is now potentially reviewable by

certification, experience has shown that the courts have used certification sparingly. Thus, allowing review of remand orders by certification would not burden the courts with a flood of remand appeals. On the contrary, remands would only be reviewed when both the district court and the court of appeals conclude that review will likely expedite litigation, not delay it.

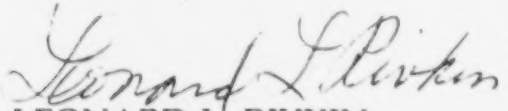
By granting certiorari and ruling that remand orders may be reviewed by certification under § 1292(b), the Court will ensure appropriate appellate review of occasional difficult and important questions of federal jurisdiction (when the lower courts conclude that such review is desirable and efficient) while preserving the § 1447(d) bar on review of virtually all orders remanding for lack of jurisdiction—consistent with the intent of Congress in enacting both statutes.

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the judgments of the Court of Appeals for the Second Circuit.

Dated: Uniondale, New York
September 4, 1992

Respectfully submitted,



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APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 8, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RYAN v. DOW CHEMICAL CO.

92-8008

NOTICE OF MOTION
Petition for Permission to Appeal Under
28 U.S.C. §1292(b)

MOTION BY:

Steven Brock
Rivkin, Radler & Kremer
E A B Plaza
Uiniondale, New York 11556-0111
(516) 357-3000

OPPOSING COUNSEL:

Kelly L. Newman
350 North Sam Houston Parkway
Houston, Texas 77060
(713) 448-1173

Has consent of opposing counsel:		
A. been sought?	___yes	_x_no
B. been obtained?	___yes	_x_no
Has service beed effected?	_x_yes	___no

Is oral argument desired? ___yes ___no
Second Circuit Rule 27(e) states that petitions for leave to appeal "shall be submitted without oral argument"
Requested return dated:
Has argument dated of appeal been set:
A. by scheduling order? ___yes _x_no
B. by firm date of argument notice? ___yes _x_no
C. If Yes, enter dated:_____

Judge or agency whose order is being appealed:

Judge Jack B. Weinstein

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ___yes ___no
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ___yes ___no
If No. explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ___yes ___no

---

Brief statement of the relief requested:

The district court has certified two issues for immediate review: subject matter jurisdiction under 28 U.S.C. § 1442(a)(1) and appellate jurisdiction under 28 U.S.C. § 1292(b). Defendants request that the Court grant permission to appeal so that these issues may be fully briefed and reviewed by the Court.

By: s/_____
Steven Brock
Appearing for: The Dow Chemical Company

Appellant or Petitioner:
___Plaintiff _x_Defendant
Appellee or Respondent:
___Plaintiff ___Defendant

Date: April 15, 1992

----------ORDER---------

IT IS HEREBY ORDERED that the motion be and it is hereby denied. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976).

s/_____
George C. Pratt

s/_____
J. Daniel Mahoney (p)

s/_____
Joseph M. McLaughlin

Dated May 8, 1992
Filed May 8, 1992

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 8, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RYAN v. DOW CHEMICAL CO.

92-8008

NOTICE OF MOTION
for reconsideration and for recall and
modification of mandate

MOTION BY:

Steven Brock
Rivkin, Radler & Kremer
E A B Plaza
Uiniondale, New York 11556-0111
(516) 357-3000

OPPOSING COUNSEL:

Kelly L. Newman
350 North Sam Houston Parkway
Houston, Texas 77060
(713) 448-1173

Has consent of opposing counsel:

A. been sought?	___yes	_x_no
B. been obtained?	___yes	_x_no
Has service beed effected?	_x_yes	___no

Is oral argument desired? _x_ yes ___ no
(Substantive motions only)
Requested return date: June 2, 1992
(See Second Circuit Rule 27(b))
Has argument dated of appeal been set:
A. by scheduling order? _x_ yes ___ no
B. by firm date of argument notice? ___ yes _x_ no
C. If Yes, enter date: As early as week of August 10, 1992

Judge or agency whose order is being appealed:

Judge Jack B. Weinstein

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ___ yes ___ no
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ___ yes ___ no
If No. explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ___ yes ___ no

---

Brief statement of the relief requested:

The District Court has certified two issues for immediate review: subject matter jurisdiction under 28 U.S.C. §§ 1442(a)(1) and appellate jurisdiction under 28 U.S.C. § 1292(b). Defendants' Petition for Permission to Appeal was denied by this court on May 8, 1992. Defendants seek reconsideration and

recall and modification of the Court's mandate based on two recent decisions.

By: s/_____
Steven Brock
Appearing for: The Dow Chemical Company

Appellant or Petitioner:
___Plaintiff _x_Defendant
Appellee or Respondent:
___Plaintiff ___Defendant

Date: May 22, 1992

----------ORDER---------

IT IS HEREBY ORDERED that the motion be and it is hereby denied.

s/_____
George C. Pratt

s/_____
J. Daniel Mahoney (p)

s/_____
Joseph M. McLaughlin (p)
Circuit Judge

Dated June 8, 1992
Filed June 8, 1992

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 16, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IVY v. DIAMOND SHAMROCK CHEMICALS

92-7487

NOTICE OF MOTION
DISMISSING APPEAL

MOTION BY:

Robert M. Hager
2020 Pennsylvania Ave. NW
Washington, D.C. 20006-1811
(202) 331-9831

OPPOSING COUNSEL:

Steven Brock
Rivkin, Radler & Kremer
E A B Plaza
Uiniondale, New York 11556-0111
(516) 357-3000

Has consent of opposing counsel:		
A. been sought?	_x_ yes	___ no
B. been obtained?	___ yes	_x_ no
Has service beed effected?	_x_ yes	___ no
Is oral argument desired?	___ yes	_x_ no

(Substantive motions only)
Requested return dated: June 8, 1992
Has argument dated of appeal been set:
A. by scheduling order? _x_ yes ___ no
B. by firm date of argument notice? ___ yes _x_ no
C. If Yes, enter dated: as early as October 9, 1992

Judge or agency whose order is being appealed:

Judge Jack B. Weinstein

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ___ yes ___ no
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ___ yes ___ no
If No. explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ___ yes ___ no

---

Brief statement of the relief requested:

Notice of Appeal from order remanding case to state court filed after denial of 28 U.S.C. § 1292 Petition for Permission to Appeal the same order (92-8008), stating same grounds for appeal, is repetitive and frivolous. Notice of Appeal should be dismissed under 28 U.S.C. § 1447(d) and final judgment rule.

By: s/_____
ROBERT HAGER
Appearing for: CHARLES BROWN

Appellant or Petitioner:
___Plaintiff ___Defendant
Appellee or Respondent:
_x_Plaintiff ___Defendant

Date: May 29, 1992

----------ORDER---------

Before: Hon. Thomas J. Meskill, Hon. George C. Pratt, C.J.J. and Hon. Robert R. Merhige, D.J.

IT IS HEREBY ORDERED that the motion be and it is hereby granted.

ELAINE B. GOLDSMITH, Clerk

By: s/

Edward J. Guardaro, Staff Atty

Dated June 16, 1992
Filed June 16, 1992

APPENDIX D

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 30, 1992

MEMORANDUM AND ORDER

CV-89-3361

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 Civ. 747

MICHAEL F. RYAN, et al.,
Plaintiffs,
-against-
DOW CHEMICAL CO., MONSANTO CO., HERCULES INC., T. H. AGRICULTURE & NUTRITION CO., INC., DIAMOND SHAMROCK CHEMICALS CO., UNIROYAL, INC., and THOMPSON CHEMICALS CORP.,
Defendants.

MDL No. 381
In re "AGENT ORANGE"
Product Liability Litigation

---

89 Civ. 3361

SHIRLEY IVY, et al.,
Plaintiffs,
-against-
DIAMOND SHAMROCK CHEMICALS CO., et al.,
Defendants.

Jack B. Weinstein, District Judge:

On January 29, 1992, a memorandum and order was issued remanding the suits of civilian plaintiffs Charles Brown and Clarence White. See *In re "Agent Orange" Prod. Liab. Litig.*, ___ F. Supp. ___, MDL No. 381 (E.D.N.Y. Jan. 29, 1992). Because the memorandum and order also certified a question for appeal under 28 U.S.C. § 1292(b), the remand was stayed pending the resolution of any appeal.

Defendants subsequently moved for reargument and a stay on their time to appeal the certified issue in order to reargue the January 29 memorandum and order. The motion was granted on February 7, 1992.

All Supplemental and reply papers pertaining to the motion to reargue have now been considered. For the reasons stated in the court's memorandum and order of January 29, the plaintiff's actions are remanded. The order of remand is stayed pending appeal of the issue certified under section 1292(b).

So ordered.

March 30, 1992
Brooklyn, New York

s/
Jack B. Weinstein,
United States District Judge

APPENDIX E

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED FEBRUARY 7, 1992

ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 Civ. 747

MICHAEL F. RYAN, et al.,

Plaintiffs,

-against-

DOW CHEMICAL CO., MONSANTO CO., HERCULES INC., T. H. AGRICULTURE & NUTRITION CO., INC., DIAMOND SHAMROCK CHEMICALS CO., UNIROYAL, INC., and THOMPSON CHEMICALS CORP.,

Defendants.

MDL No. 381

In re

"AGENT ORANGE"
Product Liability Litigation

---

89 Civ. 3361

SHIRLEY IVY, et al.,

Plaintiffs,

-against-

DIAMOND SHAMROCK CHEMICALS CO., et al.,

Defendants.

AND NOW, this 7th day of February, 1992, in consideration of the Affidavit of Steven Brock sworn to February 4, 1992, in support of the Order to Show Cause for Deferral of Certification Pending Reargument granted on February 4, 1992, and the Court having heard oral argument on February 6, 1992, it is

ORDERED that defendants' motion for reargument of the Court's Memorandum and Order of Remand dated January 29, 1992 (the "Order") is GRANTED and made returnable on February 24, 1992, with papers to be submitted by the parties in accordance with the following schedule: defendants' motion papers on February 13, 1992; plaintiffs' opposing papers, if any, February 20, 1992; defendants' reply papers, if any, February 24, 1992; and it is further

ORDERED that, to permit consideration of said reargument motion prior to application to the Court of Appeals for permission to appeal pursuant to 28 U.S.C. § 1292(b), the Order be amended, and hereby is amended, by deleting in its entirety the first full paragraph on page 46, which certified the Order pursuant to 28 U.S.C. § 1292(b), pending consideration of defendants' motion for reargument, following which, the Order shall be certified for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Dated: February 7, 1992
Brooklyn, New York

s/
Jack B. Weinstein
United States District Judge

APPENDIX F

MEMORANDUM AND ORDER OF REMAND OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JANUARY 29, 1992

MEMORANDUM AND ORDER OF REMAND

Michael F. RYAN, et al., Plaintiffs,
v.
DOW CHEMICAL CO., Monsanto Co., Hercules Inc., T.H. Agriculture & Nutrition Co., Inc., Diamond Shamrock Chemicals Co., Uniroyal, Inc., and Thompson Chemicals Corp., Defendants

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

Shirley IVY, et al., Plaintiffs,
v.
DIAMOND SHAMROCK CHEMICALS CO., et al., Defendants.

Nos. 79 Civ. 747, 89 Civ. 3361.
MDL No. 381.

United States District Court, E.D. New York.

Jan. 29, 1992.

Kelly L. Newman, Houston, Tex., for Clarence White.

Cadwalader, Wickersham & Taft, New York City, by Michael M. Gordon, for Diamond Shamrock Chemicals jCo.

Clark, Gagliardi & Miller, White Plains, nN.Y. by Lynn Pucino, for T.H. Agriculture & Nutrition Co., Inc.

Lord Day & Lord, Barrett Smith, New York City by John C. Sabetta, for Monsanto lCo.

Rivkin, Radler, Bayh, Hart & Kremer, Uniondale, N.Y. by Steven Brock, for Dow Chemical Co.

Shea & Gould, New York City by Myron Kalish, for Uniroyal, Inc.

Robert M. Hager, Washington, D.C., for Shirley Ivy.

WEINSTEIN, District Judge:

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Plaintiffs Charles Brown and Clarence White were civilians in Vietnam during the war. They claim injuries from exposure to herbicides produced by defendants and used by the United States Armed Forces. These suits (the civilian actions), which sound exclusively in state law, along with companion actions by veterans and their families (the veteran actions), were commenced in Texas state court collectively under the caption *Ivy v. Diamond Shamrock Chemicals Co., 89 Civ. 3361. See also Hartman v. Diamond Shamrock Chemicals Co., 90 Civ. 3928.* The *Ivy* and *Hartman* actions were removed by the defendants to federal court in Texas and then transferred to this court by the Multidistrict Litigation Panel.

In *In re "Agent Orange" Product Liability Litigation,* 781 F.Supp. 902, (E.D.N.Y.1991), the veteran actions were dismissed because the plaintiffs in those actions were members of the class whose action was settled in 1984. Consideration of subject

matter jurisdiction over the civilian actions was reserved. *See Id.*

Pending before the court are two motions. The civilian plaintiffs have moved to remand their suits to Texas state court because there is no diversity of citizenship or other ground for federal jurisdiction. The defendants have moved to amend their notice of removal in the *Ivy* case to add 28 U.S.C. § 1442(a)(1) on the ground that they were acting under government orders when they supplied herbicides and were therefore entitled to removal under that provision. While amendment of the notice of removal is appropriate despite the defendants' failure to mention section 1442(a)(1) in their removal notice, defendants were not acting under government officials as required by that section. Remand is therefore required.

I. FACTS

A. *Supply of Herbicides to the United States*

The military use of Agent Orange and other chemical defoliants in the Vietnam war has been described elsewhere.. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 775-77 (E.D.N.Y. 1984). Some basic facts bear repeating. These facts are discussed here for jurisdictional purposes only.

President Kennedy first approved the use of chemical defoliants in Vietnam toward the end of 1961, with actual spraying beginning the next year and lasting until 1971. *Id.* During this period, various chemical formulas were used under different names, such as Agent Purple and Agent Pink. The

particular compound known as Agent Orange was used by United States forces between 1965 and 1971.

The theory of both the veteran and civilian actions is that when the United States sprayed these defoliants, it exposed the plaintiffs to dangerous levels of dioxin. Dioxin was an unwanted byproduct in the manufacture of the defoliants. Although dioxin had no herbicidal effect and was never listed as an ingredient in the defoliants, it appeared in varying amounts in the herbicides delivered by the defendants to the Defense Department. As affidavits from some defendants' employees indicate, the component elements of the herbicides delivered to the Defense Department, including the elements whose production generated dioxin, were developed and used long before the Vietnam war. *See, e.g., Affidavit of John P. Frawley* ¶ 2 (March 1980) (Hercules employee); *Affidavit of William J. McCarville* ¶ 4 (Dec. 10, 1991) (Monsanto employee); *Affidavit of Michael M. Gordon* ¶ 4 (Dec. 12, 1991) (Diamond Shamrock counsel); *see also In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 848-49 (E.D.N.Y.1984) (noting that Agent Orange was "closely related to 'shelf products' with which the chemical companies had a good deal of familiarity from the civilian market" and that "defendants had years of experience with the herbicides components").

Initial use of chemical defoliants as weapons was relatively selective. In fiscal year 1965, for example, about 400,000 gallons of herbicides were used militarily, as compared to the 3.4 million gallons produced in the United States that year. W. Buckingham, *Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia 1961-1971*, at 133 (1982). By fiscal

year 1966, however, the military use of defoliants had increased to 1.6 million gallons annually, and the Defense Department at that time projected that it would require Agent Orange in amounts that exceeded domestic production capacity. Those projections proved overstated, however, and by 1968 the perceived supply crisis had passed.

From the outset of the spraying program, federal officials, acting on behalf of the Defense Department, entered into contracts with the defendants for delivery of herbicides to the government. Most of these contracts—and all of the contracts for Agent Orange—were entered into pursuant to regulations issued by the National Production Authority (NPA) and its successor, the Business and Defense Services Administration (BDSA). The NPA and BDSA were the executive branch agencies within the Commerce Department charged with establishing regulations for obtaining materials necessary for military use under the Defense Production Act, 50 U.S.C. App. § 2061 *et seq.* (1988).

BDSA Regulation 2, at the time codified in 32A C.F.R. chapter VI, established a rating system by which different government orders for supplies were granted priority. From less to more urgent, the hierarchy ran: unrated orders, DO-rated orders, DX-rated orders, Mandatory Orders or Directives. *See* BDSA Reg. 2, §§ 3, 16. Section 10 of Regulation 2 established that all rated orders (whether DO- or DX-Rated) "must be accepted and filled regardless of existing contracts and orders," subject to certain exceptions. Section 16 of Regulation 2 made performance of all Mandatory Orders and Directives compulsory. Section 27 of Regulation 2 rendered violators of

sections 10 and 16 subject to criminal fines or imprisonment.

At various times between 1962 and 1971, each of the defendants supplied Agent Orange to the government under DO-rated contracts. In 1966-1967, the expected shortage of Agent Orange caused the Executive Secretary of the BDSA to issue letters to the defendants requiring them to divert to the Defense Department what amounted to their entire civilian production of herbicides. For all orders, the government specified the chemical recipe for Agent Orange as well as the terms of its packaging and delivery. Government officials inspected defendants' production facilities. They also tested finished products to ensure compliance with contract specifications. As indicated above, however, the chemistry specified by the government was already being used by the defendants.

B. *Defendants' Removal Notice*

After the civilian actions were commenced as part of the *Ivy* action in Texas state court, defendants removed to federal court. Section 1442(a)(1) of Title 28 was not mentioned in the initial notice of removal. Instead, the removal notices in both the *Hartman* and *Ivy* cases mentioned only "artful pleading," "federal question" and "federal preemption" grounds for removal. *See In re "Agent Orange" Prod. Liab. Litig., 781 F.Supp. 902, (E.D.N.Y.1991).* The removal notice did cite *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988),—a case outlining the federal common law military contractor defense—but only to support the "federal preemption" basis for removal. The issue of section

1442(a)(1)'s applicability was not explicitly raised until 1991, when defendants filed their motion for leave to amend their notice of removal under 28 U.S.C. § 1653.

II. LAW OF REMOVAL

The federal officer removal statute allows executive branch officials and persons acting under them to remove to a federal court civil and criminal action brought against them in a state court for their official acts. So far as relevant, the provision, 28 U.S.C. § 1442(a)(1), reads:

> (a) civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office....

Section 1442(a)(1) is designed to prevent state courts from interfering with the implementation of federal law. The provision does so by allowing those whose federal activity may be inhibited by state court actions to remove to the presumably less biased forum of federal court. The provision confers federal subject matter jurisdiction over properly removed actions. *See Niagara Mohawk Power Corp. v. Bankers Trust Co.*, 791 F.2d 242, 244 (2d Cir.1986).

[1,2] Under current Supreme Court case law, proper removal of an action under section 1442(a)(1) requires the satisfaction of two elements. First, the defendant must raise a colorable claim to a federal law defense. *Mesa v. California*, 489 U.S 121, 109 S.Ct. 959, 966–69, 103 L.Ed.2d 99 (1989). Second, the defendant must establish that there is "a causal connection between what the officer has done under asserted official authority and the state prosecution." *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33, 46 S.Ct. 185, 190, 70 L.Ed. 449 (1926) (interpreting predecessor statute). To satisfy the causation element, the defendant must prove that the acts being sued upon were undertaken by a federal officer or "person acting under him," *Florida v. Cohen*, 887 F.2d 1451, 1453–54 (11th Cir.1989), and that those acts were under color of the relevant federal office. *Maine Ass'n of Interdependent Neighborhoods v. Commissioner*, 876 F.2d 1051, 1054 (1st Cir.1989).

[3] Federal officials and their subordinates who satisfy these elements overcome the well-pleaded complaint rule of *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), and gain access to federal court where no federal question is presented by the plaintiff. *See Mesa*, 109 S.Ct. at 968. The right to remove is absolute, provided the proper procedures are followed. *Willingham v. Morgan*, 395 U.S. 402, 406, 89 S.Ct 1813, 1815, 23 L.Ed.2d 396 (1969).

Defendants now claim to have been persons "acting under" federal officers within the meaning of section 1442(a)(1) when they contracted to sell, manufacture and deliver to the Department of Defense the herbicides that plaintiffs allege injured them. This

contention raises close questions of procedure and substantive law. With respect to procedure, the issue is whether the defendants may now plead section 1442(a)(1) as a basis for jurisdiction, having failed to do so in their initial removal notice in the *Ivy* case. The substantive question is whether that portion of the defendants' conduct allegedly giving rise to plaintiffs' state law claims constituted acts under an officer within the meaning of section 1442(a)(1).

A. *Pleading Requirements*

[4] In removal cases, defendant bears the burden of showing that removal is clearly appropriate: "if the right to remove is doubtful, the case should be remanded." *Lance Int'l, Inc. v. Aetna Cas. & Sur. Co.*, 264 F. Supp. 349, 356 (S.D.N.Y.1967); *see also Roche v. American Red Cross*, 680 F.Supp. 449, 451 (D.Mass. 1988) (noting accord with authorities from Fifth and Seventh Circuits).

1. Amendment of Removal Notice Upon Failure to Plead

[5] As applied to removal petitions, section 1653 allows parties to clarify pleadings after filing. It does not sanction the addition of new substantive allegations. *See Jacobs v. District Director of Internal Revenue*, 217 F.Supp. 104, 105 (S.D.N.Y.1963); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3733, at 537–38 (2d ed. 1985) (after 30-day period for filing of removal notice, "petition may be amended only to set out more specifically grounds for removal that already have been stated, albeit imperfectly, in the original petition; new grounds may not be added and missing allegations may not be

furnished") (citations omitted). To prevail on their motion, defendants must therefore show that the § 1422(a)(1) ground for removal was implicit in the original notices of removal.

An examination of cases that have allowed amendment of removal notices to include § 1442(a)(1) as a basis for removal reveals, as an initial matter, two loosely defined categories of cases: "mislabelling" and "lack of specificity" cases. In the former, a defendant asserts facts supporting a § 1442 removal, but then seeks removal under another statutory provision. In the latter, the defendant explicitly seeks § 1442 removal, but fails to specify the facts necessary to support such removal.

Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), presents an example of a "lack of specificity" case. The prison officials in that case had explicitly sought § 1442(a)(1) removal on grounds of official immunity, yet failed to allege in the removal petition facts supporting the claim that the conduct upon which plaintiff was suing was under color of their office. Such facts were later alleged by defendants in affidavits in support of a motion for summary judgment. The Supreme Court treated these later, more specific, statements as having "amended" the petition for removal. *Id.* at 407 n. 3. 89 S.Ct. at 1816 n. 3.

By contrast, *Walker v. Gibson*, 604 F.Supp. 916 (N.D.Ill.1985), is an example of a mislabelling case. The issue of possible federal immunity was averred in the removal petition, which stated that defendant planned to argue that his actions were taken "as a federal official and within the scope of his employ-

ment." *Id.* at 918. The defendants, however, sought removal under a provision inappropriate to the substance of the defense. The court allowed the defendants to relabel their removal petition. *Id.* at 919; *see also Bennett Constr. Co. v. Allen Gardens, Inc.*, 433 F.Supp. 825, 832 (W.D.Mo.1977) (although § 1442(a)(1) was not cited, removal under that section appropriate where there is no dispute that defendant was acting as Secretary of HUD); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160, 164 (S.D.N.Y.1965) (failure to cite 28 U.S.C. § 1442 as a basis for removal is a mere technical defect where facts support removal under that section).

A hybrid approach that combines mislabelling and lack of specificity analysis to support liberal amendment of removal notices is illustrated by *National Audubon Society v. Department of Water & Power*, 496 F.Supp. 499 (E.D.Cal.1980), which relied in part upon the Supreme Court's review in *Willingham, supra,* of the entire case file, including affidavits, in order to determine whether the facts already known to the court brought the case within section 1442(a)(1). Various groups had sued the Los Angeles Department of Water and Power for harming the Mono Lake Basin by diverting water. The defendants then counterclaimed and filed a third-party complaint against the United States Forest Service and the Bureau of Land Management. The United States initially sought removal solely under federal question jurisdiction pursuant to 28 U.S.C. § 1441. Later, it sought to amend the petition to abandon the section 1441 claim and instead raise a section 1442 ground for removal. The court allowed the amendment despite the fact that the removal notice made no reference to section 1442 or to specific facts

supporting section 1442 removal. Relying on *Willingham* and its inherent powers of judicial notice, it held that a court ought to "review the entire file to determine what the file fairly reflects at the time it considers the motion to amend." *Id.* at 503. On the basis of the facts in the file, the court concluded that there were facts sufficient to warrant amendment and removal.

2. Application of Law

[6] The facts of the instant case present either a borderline mislabelling case or a hybrid case that falls within the parameters of the *National Audubon* line. As indicated above, the *Ivy* removal notice on its face appears to have made only an oblique reference to the issue of whether the defendants could lay claim to the federal military contractor defense by citing the *Boyle* case. That reference takes on special meaning, however, when read in light of the history of the Agent Orange litigation, with which all parties and the court are quite familiar. It was and has been clear from the earliest stages of the litigation that, with respect to any action based on exposure to Agent Orange, the defendants would claim in their defense that they produced herbicides for military use under compulsion by federal officials. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 843–50 (E.D.N.Y.1984) (discussing possible validity of government contractor and Defense Production Act defenses that defendants would raise absent settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618, 620 (E.D.N.Y.1981) (denying summary judgment for defendants on basis of government contractor defense). Not surprisingly, the government compulsion argument formed the crux of the

defendants' "federal question" and "federal preemption" claims. *See, e.g., Defendants' Memorandum of Law in Response to Plaintiff's Motion to Remand,* at 12–15 (Dec. 14, 1990).

In light of the defendants' claim to have been acting under federal officers, consistently maintained through a decade of Agent Orange litigation, there was sufficient evidence before the court in the notice of removal and the case file to permit amendmant of the defendants' removal notice to include a section 1442(a)(1) claim. An analysis of the substance of that section is therefore required.

B. *28 U.S.C. § 1442(a)(1)*

1. History of § 1442

To understand the scope of section 1442(a)(1), some historical context is required. Section 1442 has several predecessors. *See Willingham,* 395 U.S at 405–06, 89 S.Ct. at 1815; P. Bator, D. Meltzer, P. Mishkin & J. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1057–60 (3d ed. 1988); Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress,* 29 Santa Clara L.Rev. 21, 28–41 (1989). Its earlier incarnations were drafted to protecct officials who faced state government resistance to specific federal laws. The concern underlying each, however, has been the same: that state governments hostile to duly enacted federal laws would be able to frustrate the implementation of those laws by bringing (or allowing to be brought) civil or criminal actions in state court against the federal officials responsible for their implementation. Although the

Supreme Court can assist in the protection of federal interests by reviewing decisions of state courts, *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 350, 4 L.Ed. 97 (1816), Congress has found it expedient in certain instances to allow officials sued in state courts to remove immediately to the federal courts.

The first executive officer removal statute was passed in 1815. Following the War of 1812, Vermont sought to skirt a national trade embargo against Britain by limiting the extent to which federal customs officials could delegate their authority to conduct inspections. Subordinate inspectors lacking specific authorization for their searches were subject to civil liability. *See* Rosenblatt, *supra*, at 29–30. In response, Congress passed a statute allowing for removal of suits "against any collector, naval officer ... or any other person aiding or assisting," for any actions undertaken within the scope of the officer's duties. *Id.* at 31.

The need for an officer removal statute arose again during the nullification controversy that preceded the Civil War. In 1832, South Carolina authorized the criminal prosecution of federal tariff collectors. Congress responded by providing for removal of any "suit or prosecution" against an officer "or other person" acting pursuant to federal customs laws. *Id.* at 34. For the duration of the Civil War itself, Congress expanded removal to include suits against any civil or military officer or any other person acting "by virtue or under color of any authority derived from or exercised by or under" the President or Congress. *Id.* After the Civil War, several versions of a removal statute designed to protect federal revenue officers performing duties

pertaining to internal revenue collection were enacted. *See id.* at 36.

In the 1860s and 1870s, Congress granted similar protections to persons owning property pursuant to federal law and to members of Congress for acts performed in the course of their duties. *See id.* at 38 n. 64, 39. These provisions and those protecting federal revenue officers were combined in section 33 of the Judicial Code of 1911, codified at the time at 28 U.S.C. § 76. The 1911 statute was amended in 1916 to extend the power of removal to judicial officers faced with suits based on their official actions. *See, e.g., Gay v. Ruff,* 292 U.S. 25, 27 n. 1, 54 S.Ct. 608, 609 n. 1, 78 L.Ed. 1099 (1934).

The accumulation of specific protections for officials in each of the three branches culminated in 1948 with the enactment of section 1442(a). Section 1442(a)(1)–(4) incorporated the protections that section 33 afforded to executive, legislative and judicial officials. In addition, the present language of section 1442(a)(1) was adopted, which granted removal to *any* executive branch officer or "person acting under him" rather than just to revenue officers. 28 U.S.C. § 1442 (1988) Historical and Revision Notes.

The federal officer removal statute thus saw continuous expansion between 1815 and 1948. Nevertheless, the underlying rationale of its various incarnations has been constant.

> The series of enactments culminating in Section 1442(a) were initially designed to protect Federal revenue officers from prosecution or civil suit in State Court for violations of State law.

> Removal was restricted to cases where the officer[']s defense was that no personal liability, civil or criminal, could be attached to his action, since he was only performing his Federal duties.
>
> Subsequent amendments have, from time to time, enlarged the class of Federal officers and employees who might claim protection, but these additions have left unchanged the basic theory and purpose of the removal privilege: that the officer was entitled to—and the interest of national supremacy required—his protection in actions brought against him which attacked and threatened him with personal liabilities or penalties.

New Jersey v. Moriarity, 268 F.Supp. 546, 555 (D.N.J.1967) (citations omitted).

Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), is the leading Supreme Court case interpreting section 1442(a)(1). *Willingham* held that federal prison officials sued by a prisoner for alleged mistreatment were entitled to § 1442(a)(1) removal because they maintained a colorable claim to a defense of official immunity. Reviewing the history of § 1442(a), the Court concluded that the purpose of the modern statute, despite its expansion over its predecessors, was essentially that outlined in *Tennessee v. Davis*, 100 U.S. 257, 25 L.Ed. 648 (1879). *Davis* interpreted the 1866 version of the revenue officer's removal statute to allow removal of the murder prosecution of a deputy revenue collector who killed a man while attempting to seize an illegal distillery:

> [The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.

Id. 100 U.S. at 263 (quoted in *Willingham*, 395 U.S. at 406, 89 S.Ct. at 1815).

Section 1442(a)(1), the *Willingham* Court noted, ultimately rests on the Supremacy Clause, i.e., "the very basic [federal] interest in the enforcement of federal law through federal officials." *Willingham*, 395 U.S. at 406, 89 S.Ct. at 1816. Accordingly, it should not be given "a narrow, grudging interpretation." *Id.* at 407, 89 S.Ct. at 1816. Rather, it is applicable *"at the very least"* in "all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Id.* at 406–07, 89 S.Ct. at 1816 (emphasis added).

Mesa v. California, 489 U.S. 121, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989), signalled a narrowing of section 1442. Two mail carriers were charged by California with crimes relating to their operation of mail trucks. The defendants successfully removed to federal court even though they were not able to claim official immunity. *Id.* 109 S.Ct. at 961–62. The Court remanded,

and, contrary to *Willingham*, found it necessary to emphasize the limited scope of 1442(a)(1). With one possible narow exception, *see id.* 109 S.Ct. at 966, a defendant seeking removal under § 1442(a)(1) must now allege a federal law defense. *Id.* at 966–67. The Court thereby closed, without locking, the window left open by *Willingham's* "at the very least" language.

The restrictive approach in *Mesa* reflects concern by the Court over the rapid expansion of federal court jurisdiction. Between the time of *Willingham* and *Mesa*, for example, the courts found section 1442(a)(1) conferred jurisdiction in a broad array of cases well outside the paradigm case of the individual official being intimidated by the threat of civil or criminal prosecution in state courts. *See* cases discussed in Part II.B.2.b *infra*. In this respect, *Mesa* is in keeping with other recent decisions in which the Court has found it appropriate to limit federal court encroachment on state court jurisdiction. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (federal district court in New York lacks authority to enjoin enforcement of Texas state court judgment pending state court appeals).

On the heels of *Mesa* came the further restriction of section 1442(a)(1) removal in *International Primate Protection League v. Administrators of Tulane Educational Fund*, ___ U.S. ___ 111 S.Ct. 1700; 114 L.Ed.2d 134 (1991). Rejecting the view of some circuits, the Court held that state court suits naming only a federal agency (rather than a particular official) as defendant were not removable under § 1442(a)(1) because a federal agency was neither an "officer of the United States" nor a "person acting under him."

Justice Marshall, who twenty-two years earlier had authored *Willingham*, emphasized the limited focus of section 1442 by holding that the statute ought to be interpreted as if it reads "officer of the United States or *of* an agency thereof."

The Court also reasoned that, in protecting officials rather than agencies, Congress sought to distinguish lawsuits on the basis of their susceptibility to state court manipulation. Congress wished to protect individual officials because, typically, they would be relying on an official immunity defense, a type of defense "fraught with difficulty and subject to considerable manipulation." *Id.* 111 S Ct. at 1709. By contrast, suits against agencies are more straightforward, leaving hostile state courts with less room to discriminate.

2. Elements of § 1442(a)(1)

a. *Colorable Claim to a Federal Defense*

Mesa requires in the first instance that defendants assert a federal defense. *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959, 966–67, 103 L.Ed.2d 99 (1989). The question is not whether a defendant's claimed defense is metitorious, but only whether a colorable claim to such a defense has been made. *Id.* 109 S.Ct. at 966.

Defendants aver a colorable claim to two federal defenses: the federal common law "government" or "military contractor" defense, *see Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), and the liability-limiting provi-

sions of the former Federal Defense Production Act, 50 U.S.C. App. § 2071 (1988).

[1] *Government Contractor Defense*

[7] With respect to the production of Agent Orange, the government contractor defense allows a defendant who manufactures products at the direction of the federal government to escape tort liability for harms caused by those products "so long as it informs the government of known hazards or the information possessed by the government regarding those hazards is equal to that possessed by the contractor." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir.1987), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2899, 101 L.Ed.2d 932 (1988). The doctrine thus provides protection to manufacturers not at fault, safeguards the procurement process, and prevents the courts from second-guessing executive branch procurement strategies. *See id.* at 191.

In *Boyle*, the Supreme Court further shaped the contours of this defense, holding that it preempts state product liability law for design defects whenever: (1) the United States approved reasonably precise specifications for the contracted-for equipment; (2) the equipment produced conformed to those specifications; and (3) the equipment supplier warned the United States about possible dangers presented by the equipment that were known to the supplier but not to the United States. *Boyle*, 108 S.Ct. at 2518.

There is considerable question as to whether the military contractor defense amounts to a defense of official immunity, or even to a defense at all.

Generally, the Supreme Court has been reluctant to expand the federal common law of official immunity in the absence of specific congressional legislation. *See Boyle*, 108 S.Ct. at 2523–24 (Brennan, J., dissenting). This is because "official immunity comes as a great cost," and thus "absolute immunity for federal officials is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 583, 98 L.Ed.2d 619 (1988) (quoting *Doe v. McMillan*, 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed.2d 912 (1973)).

In *Boyle*, the Court refused to characterize its preemption analysis as extending official immunity to government contractors. *See Boyle*, 108 S.Ct. at 2514 n. 1. In fact, the majority took pains not to disagree with the dissent's claim that official immunity has never been understood to extend to contractors acting independently of any congressional enactment. *See id.; id.* at 2524 (Brennan, J., dissenting). Most relevant to the issue of § 1442(a)(1) removal, the *Boyle* dissent noted that "a grant of immunity to Government contractors could not advance 'the fearless, vigorous, and effective administration of policies of government' nearly as much as does ... immunity for Government employees." *Id.* at 2524 (Brennan, J., dissenting) (quoting *Barr v. Matteo*, 360 U.S. 564, 576, 79 S.Ct. 1335, 1342, 3 L.Ed.2d 1434 (1959) (plurality opinion)). It is, of course, the vigorous pursuit of policy by government officials that section 1442(a)(1) is designed to protect.

[8] The defendants themselves question whether the military contractor defense is best understood as a

defense. The defendants now regard the doctrine as a form of official immunity which entitles them to section 1442(a))(1) removal. Previously, in their attempt to remove on the basis of federal question jurisdiction, the defendants had cast the military contractor defense as a liability standard. Citing previous *Agent Orange* cases, the defendants noted that the military contractor "defense" is "conceptually better seen as part of the basis of liability." *Defendants' Memorandum of Law in Response to Plaintiffs' Motion to Remand* at 12 (Dec. 14, 1990) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 843 (E.D.N.Y.1984)). On this view, the military contractor defense—which provides that a contractor must inform the government of any dangerous consequences of using its product of which the government does not know—establishes not a defense but a federal common law standard of care that must be met to avoid liability.

[2] *Defense Production Act*

[9] If defendants were relying solely on the federal common law military contractor "defense," there would be a question as to the existence of the colorable claim to a federal defense required by *Mesa*. They have, however, also pled reliance on section 707 of the Defense Production Act. *See* 50 U.S.C. App. § 2061 *et seq.* (1988). The Act, which expired by its terms in 1990, *see id.* § 2166, was passed in 1950 at the outset of the Korean war to ensure governmental access to materials necessary for the war effort. Section 707 of the Act immunized contractors who were forced under threat of criminal sanction to perform contracts for the Defense Department from

certain liabilities stemming from the performance of those contracts. In relevant part, it provided:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act....

Id. § 2157. Defendants argue that section 707 provides the basis for a federal defense sufficient to support removal under *Mesa*.

The defendants make out a colorable claim to the protection of section 707. There is no dispute that Agent Orange was delivered to the United States for use in Vietnam under orders issued pursuant to the Act. *See* Part I.A, *supra: In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 844 (E.D.N.Y.1984). There is a dispute as to whether section 707 provides immunity against tort suits based in strict liability and negligence of the sort the civilian plaintiffs now wish to pursue. On a previous occasion, this court was inclined to view section 707 as immunizing contractors only for contract damages, although it did not rule on the issue. *Id.* at 844–45. For purposes of satisfying section 1442(a)(1), however, the defendants need not establish a meritorious federal defense, only a colorable claim. This burden has been met.

b. Person Acting Under an Officer

That defendants can make out a colorable claim to a federal defense does not end the inquiry. Satisfaction of the causation element of § 1442—that defendants were officers or persons "acting under" officers and that they were acting under color of

office—is also required. In other words, the set of defendants who can avail themselves of section 1442(a) is smaller than the set of defendants who can make a colorable claim to a federal defense. Moreover, the set of defendants whose federal defense is that state law must give way to contrary federal law is smaller than the set of defendants who can rely on 1442(a)(1). *See, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (defendants asserting federal preemption defenses are ordinarily not entitled to removal).

In cases like this where the defendant claims to have been a "person acting under" an officer, analysis of the two parts of the causation element tends to converge into a single inquiry: whether the defendants are being sued "based upon actions taken pursuant to federal direction." *Gulati v. Zuckerman,* 723 F.Supp. 353, 358 (E.D.Pa.1989). Defendants must prove the existence of a "federal nexus" between the actions for which they are being sued and the directives of federal officers. *See, e.g., Lowe v. Norfolk & W. Ry.,* 529 F.Supp. 491, 495 (S.D.Ill.1982) (company hired by railroad to clean chemical spill cannot remove indemnity action brought by railroad based on allegation that it cleaned pursuant to EPA regulations; EPA did not direct clean up and a "federal nexus" was otherwise lacking). Critical under the statute is "to what extent defendants acted under federal direction" at the time they were engaged in the conduct now being sued upon. *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.,* 358 F.Supp. 841, 844 (S.D.N.Y.1973); *see also Northern Colo. Water Conservancy Dist. v. Board of County Comm'rs,* 482 F.Supp. 1115, 1117–19 (D.Colo.1980)

(where federal agency exercised only the power to approve or disapprove pollution control plans developed by local governmental entities facing suits concerning content of plans, entities were not "acting under" officers; requisite nexus of control was lacking).

[1] *Who is a "Person"?*

[10] The Supreme Court has held that section 1442(a)(1)'s use of the phrase "person acting under" was not meant to include government agencies. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, ___U.S. ___, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991); *see also Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 40–41 (2d Cir.1991) (applying *Primate Protection League*). The Court did not decide, however, whether a corporation could be a "person acting under [an officer]" *Bakalis v. Crossland Sav. Bank*, 781 F.Supp. 140, 142-43 (E.D.N.Y.1991). Federal courts are divided on the question. *Compare C.H. v. American Red Cross*, 684 F.Supp. 1018, 1023-24 (E.D.Mo.1987) ("person" in 1442(a)(1) refers to natural person") *and Roche v. American Red Cross*, 680 F.Supp. 449, 455 (D.Mass.1988) (same) *and Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n*, 616 F.Supp. 1504, 1508–10 (E.D.Wis.1985) (same) *with Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 58 (5th Cir.) ("person" not limited to natural person), *cert. denied*, 422 U.S. 1043, 95 S.Ct.. 2657, 45 L.Ed.2d 694 (1975); *Bakalis*, 781 F.Supp. at 143–44 (same); *Group Health Inc. v. Blue Cross Ass'n*, 587 F.Supp. 887, 890 (S.D.N.Y.1984) (same).

Determining in a vacum what the term "person" is meant to encompass seems a fruitless exercise. The statute's use of the word could refer to either natural or legal persons. Legislative history is equally unilluminating. Although as a historical matter it seems plausible to believe that the drafters were concerned with protecting natural persons, there is almost no recorded history for the provision, and none to warrant reliance on such an intuition.

Given the arid interpretive landscape, it would seem more productive to address a slightly different question, namely, what definition of person makes sense in light of the purpose of the section read as a whole. Thus recast, the issue is whether a purely legal person such as a corporation could be engaged in activities that amount to the implementation of a federal policy under the direction of a government officer in such a manner that state court suits against corporations arising out of those activities could be a direct interference with the implementation of federal law.

It is not difficult to imagine such a circumstance. Consider, for example, the case of federal agents ordering a private telephone company to intercept and record the phone conversations of a suspected criminal pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–20. In a civil or criminal action against the company (e.g., for invasion of privacy or trespass), the telephone company arguably qualifies for removal under section 1442(a)(1) as a person acting under an officer, not merely because Congress has seen fit to grant such companies immunity for actions taken pursuant to Title III, but also because the company was acting

directly on the orders of a federal officer and it is plausible, particularly in the case of a criminal prosecution, that a state might attempt to discourage the implementation of Title III. *Cf. Camacho v. Autoridad de Telefonos,* 868 F.2d 482 (1st Cir.1989).

[2] *When Is a Person "Acting Under" an Officer?*

Having concluded that corporations can be persons within the meaning of section 1442(a)(1), the question remains whether defendant corporations such as those which produced Agent Orange are persons acting under a federal officer so as to warrant removal under section 1442(a)(1).

[11] An examination of previous cases in which private corporations and individuals have been allowed removal under section 1442(a)(1) is helpful in establishing the indicia of official control necessary to warrant removal. The rule established is that removal by a "person acting under" a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations. *Cf. Bakalis v. Crossland Sav. Bank,* 781 F.Supp. 140, 144–45 (E.D.N.Y.1991) ("The rule that appears to emerge from the case law is one of 'regulation plus ...'."). By contrast, a person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal. Likewise, the mere fact that a corporation participates in a regulated industry is insufficient to support removal absent a showing that the particular conduct being sued upon is closely

linked to detailed and specific regulations. *Bakalis*, 781 F.Supp. at 144–45. Between these extremes on the "acting under" spectrum there will, of course, be numerous close calls.

Camacho v. Autoridad de Telefonos, 868 F.2d 482 (1st Cir.1989), as was suggested by the preceding hypothetical example, is close to the "direct and detailed orders" end of the spectrum. Several residents of Puerto Rico sued quasi-public telephone companies for violations of their civil rights caused by phone taps. The defendants' removal petition was granted because the wiretaps were authorized by federal agents under 18 U.S.C. §§ 2510–20. As the court noted: "'at all times ... defendants ... were acting under express orders, control and directions of federal officers ... '" *id.* at 486 (quoting from removal petition), and the defendants' involvement was "strictly and solely at federal behest." *Id.*

By contrast, a case well away from the direct and detailed orders end of the spectrum is *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725 (3d Cir.1988). Plaintiff brought suit in state court against an association of private insurers acting as an agent through which the Export-Import Bank of the United States insured plaintiff's political risks. Although the Court of Appeals did not rule on the defendant's attempt to remove under section 1442(a)(1), it noted that

> it is not at all clear that a mere agency-principal relationship ... would be sufficient to support jurisdiction.... After all, the purpose of § 1442 removal is to protect federal officials from unfriendly state forums, to allow the official to raise

> defenses (such as immunity) arising out of his official duties, and to insure an impartial setting "free from local interests or prejudice." ... It is doubtful whether removal here would serve any of these purposes.

Id. at 734 n. 13 (citation omitted).

The majority and dissenting opinions in *North Carolina v. Ivory*, 906 F.2d 999 (4th Cir.1990), disagree about the facts of the case and therefore as to where on the spectrum the case belongs. North Carolina brought criminal charges against a United States Marine driving in a military convoy whose truck collided with a civilian vehicle, killing the civilian driver. The majority thought removal was not warranted in part because the driver's allegedly actionable conduct was not taken pursuant to specific orders. *Id.* at 1003 (finding absence of any order to driver to keep his truck close to others in convoy). The dissent thought the facts warranted the opposite conclusion. *Id.* at 1007 (Phillips, J., dissenting) (finding that defendant was acting under direct orders). Implicit in this disagreement was an agreement on the law of section 1442(a)(1): a person is only "acting under" a federal officer when under the direct and specific control of that officer.

Texas v. National Bank of Commerce, 290 F.2d 229 (5th Cir.), *cert. denied*, 368 U.S. 832, 82 S.Ct. 55, 7 L.Ed.2d 35 (1961), concerned removal of suits in which Texas brought a *quo warranto* action against private banks serving United States military installations. The Court of Appeals for the Fifth Circuit found removal appropriate in part because the banks operated only through the exercise of powers enu-

merated in Treasury Department letters. *See id.* at 231. The banks, moreover, filed monthly reports with the Treasury Department, *id.* at 231-32, which regularly reviewed each facility and retained the power to close the banks at will. *Id.* at 231. In short, removal under § 1442(a)(1) was appropriate because Texas was using its state courts to raise a direct challenge to the banking power of the national government by bringing suits against banks under exclusive and direct government control.

Distinguishable from *State of Texas* because federal control of the defendant bank was peripheral to the case is *First National Bank v. Aberdeen National Bank*, 627 F.2d 843, 848 n. 13 (8th Cir.1980). Plaintiff sued for unfair competition based on the resemblance of defendant's name to its own. Defendant's only claimed basis for removal was that the Comptroller of the Currency had approved its new name, thereby rendering the bank a person acting under an officer.

Another Fifth Circuit case, *Noble v. Employers Insurance*, 555 F.2d 1257 (5th Cir.1977), illustrates a case properly removed under section 1442(a)(1). A patient at a Veterans Administration hospital sued the insurer of a surgeon employed by the VA under the Louisiana Direct Action Statute. The Court of Appeals, treating the suit as if it were brought directly against the insured surgeon, found that the surgeon was a person acting under an officer because the surgeon had acted under the immediate supervision of the Administrator of Veteran Affairs, who evaluated the surgeon's performance and determined his hours and working conditions pursuant to federal statute. *Id.* at 1258–59.

Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F.Supp. 841 (S.D.N.Y.1973), suggests what would be the Second Circuit's view of the "person acting under" provision of section 1442(a)(1). The *Gurda* court authorized the removal of assault and trespass actions against attorneys who had committed alleged torts while acting on behalf of migrant farm workers. The decision was based upon a finding that the attorneys were governed by "exceedingly complex regulations, guidelines, and evaluation schemes," *id.* at 844, affecting the attorneys' conduct on "'a day to day basis.'" *Id.*. at 845 (quoting defendant's affidavit).

Given this level of official control, the court found removal in line with cases allowing removal by private parties being sued for actions ordered by specific officers or regulations. *See id.* at 843–44 (citing, *inter alia, Texas v. National Bank of Commerce, supra* (private banks acting under powers enumerated by federal authorities); *Oregon v. Cameron*, 290 F.Supp. 36, 36 (D.Or.1968) (VISTA employees subject to government control by "clear" chain of command); *Teague v. Grand River Dam Auth.*, 279 F.Supp. 703, 704 (N.D.Okla.1968) (dam operator acting pursuant to detailed orders and regulations regarding appropriate responses to changes in water levels); *Colorado v. Maxwell*, 125 F.Supp. 18 (D.Colo.1954) (police chief acting under order of Air Force Captain)). Several subsequent decisions have relied on *Gurda's* analysis. *See Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F.Supp. 1156, 1161–63 (S.D.Ga.1974) (facts almost identical to *Gurda*), *aff'd without opinion*, 532 F.2d 1373 (5th Cir.1976);*Swan v. Community Relations-Social Dev. Comm'n.*, 374 F.Supp. 9, 10, 11 n. 1 (E.D.Wis.1974)

(quasi-public corporation operating under same officials as defendants in *Gurda*); *cf. McGlynn v. Employers Commercial Union Ins. Co.*, 386 F.Supp. 774, 777 (D.P.R.1974) (private insurer of United States Navy not acting under officer with respect to suit brought under direct action statute; *Gurda* distinguished on facts).

Gulati v. Zuckerman, 723 F.Supp. 353 (E.D.Pa.1989), which bears some resemblance to the instant case, succinctly states the appropriate standard for section 1442(a)(1) removal. In *Gulati*, a defense contractor and its employees were sued for defaming the corporation's former president in various documents, including reports required by Department of Defense regulations and issued in response to the specific inquiries of Department officials. The court held that insofar as the defamation action was "based upon actions taken pursuant to federal direction," it was appropriately removed. *Id.* at 358; *cf. Kaplansky v. Associated YM–YWHAs*, No. 88-1292, 1989, WL 29938, at *1-*3, 1989 U.S. Dist. LEXIS 3062, at *4-*8 (E.D.N.Y. Mar. 27, 1989) (defendant sued for allegedly libelous statements made in response to federal grand jury subpoena was not acting under federal officer).

Defendants in suits against private companies acting as fiscal intermediaries for the federal Medicare program have been found entitled to removal under section 1442(a)(1). *See Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), *cert. denied*, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); *Neurological Assocs. v. Blue Cross/Blue Shield*, 632 F.Supp. 1078 (S.D.Fla.1986); *Group Health Inc. v. Blue Cross Ass'n*, 587 F.Supp. 887

(S.D.N.Y.1984); *see also Kuenstler v. Occidental Life Ins. Co.*, 292 F.Supp. 532 (C.D.Cal.1968); *Allen v.. Allen*, 291 F.Supp. 312 (S.D.Iowa 1968). Intermediaries perform the day to day work of administering an ongoing federal program under strict official oversight. For example, an insurer is held to various "performance criteria," the satisfaction of which are necessary if the insurer is to maintain its status as an intermediary. *See* 42 C.F.R. § 421.120–124 (1990).

Typical of these cases is *Neurological Associates*. The plaintiff challenged the suspension of payments by a private company acting as a Medicare intermediary. Removal was appropriate because the suspension was ordered directly by officials at the Department of Health and Human Services. *Neurological Associates*, 632 F.Supp. at 1079. *Peterson* and *Group Health* also emphasize that private companies acting as Medicare intermediaries carry out the duties of Secretary of Health and Human Services pursuant to extensive and specific federal regulations. *See Peterson v. Weinberger*, 508 F.2d 45, 51 & n. 7 (5th Cir.) (companion opinion to 508 F.2d 55), *cert. denied*, 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 47 (1975); *Group Health*, 587 F.Supp at 889, 891. When read against the background of the closely integrated system of officials and private intermediaries, *Peterson* and *Group Health* do not, as defendants in this case contend, support section 1442(a)(1) removal solely on the basis of a defendant "acting pursuant to a contract with the government." *Peterson v. Blue Cross/Blue Shield*, 508 F.2d at 58; *see Bakalis v. Crossland Sav. Bank*, 781 F.Supp. 140, ___ (E.D.N.Y.1991) ("*Group Health* ... allows private corporations to remove only when the corporation is so intimately involved with government functions as to occupy

essentially the position of an employee of the government.").

District of Columbia v. Landmark Services, Inc., 411 F.Supp. 1002 (D.D.C.1976), represents a potentially extreme application of section 1442(a)(1) that is perhaps best explicable on the basis of the special statutory language there at issue. The District of Columbia sued to enjoin the operation of a bus company providing tours of parts of Washington, D.C. because of the company's failure to comply with District licensing and registration provisions. The company sought removal on the ground that it was operating pursuant to a contract with the Department of Interior which, in turn, had been specifically authorized by Congress to contract for such tours. *See id.* at 1003 (citing 40 U.S.C. § 804). Under the terms of the authorizing legislation, any tour services for which the Secretary of the Interior arranged were "deemed transportation by the United States and shall be under the sole and exclusive charge and control of the Secretary." *Id.*

The court found that the bus company was entitled to removal because the authorizing legislation appeared to confer official immunity on the bus company by deeming it to be part of the United States government. The case is unusual because, although the court treated the bus company as a "person acting under" a federal officer, the decision appears to have turned on statutory language that essentially rendered the bus company a federal officer.

3. Application of Law

[12] Even from the brief recitation of facts provided in part I.A *supra*, it is apparent that some of the defendants' actions with respect to Agent Orange and other herbicides were under the direct and detailed control of various government officers including the Executive Secretary of the BDSA. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740, 775, 849 (E.D.N.Y.1984); *see also Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368, 1370 (E.D.N.Y.1988) (describing control exercised by government over one defendant's production of Agent Orange). The defendants were, in this respect, compelled under threat of criminal sanction to deliver Agent Orange produced according to government specifications to the Defense Department.

While these facts are clear, they are not, as defendants contend, dispositive. The issue is not simply whether the defendants acted under Commerce and Defense Department officials, but whether they are in danger of being sued in state court "based upon actions taken pursuant to federal direction." *Gulati v. Zuckerman*, 723 F.Supp. 353 (E.D.Pa.1989). Defendants are faced with suits sounding in common law strict liability, products liability, negligence, and implied warranty as well as statutory causes of action for breach of express warranty and the Texas Deceptive Trade Practices Act. The gist of these actions is that Agent Orange and other chemical herbicides were improperly designed and produced because they contained trace elements of dioxin. In this regard it is necessary to recall that Agent Orange was a mix of pre-existing chemical formulae that had long been put to domestic commercial use to reduce unwanted

vegetation along roads and railroad tracks and on farms. The government brought chemical components for Agent Orange and other defoliants as existing products privately developed and used them in mixtures which were derived from defendants' standard recipes. Thus, the "compulsion" under which the defendants operated predominantly concerned marketing rather than design and manufacture.

Although the case presents a close question, the defendants have not met the requirements of section 1442(a)(1). They are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. Although the defendants later produced and delivered Agent Orange under the control of federal officers, these subsequent acts are distinct from the earlier acts of product and manufacturing design being sued upon. The government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking.

Consideration of the purposes of section 1442(a)(1) supports this result. Defendants' removal petition raises the question: does the adjudication of a product liability suit in Texas state court against companies that sold prefabricated component parts to the federal government amount to a threat to the enforcement of federal policy sufficient to warrant removal? There is little or no outward indication that the civilian

actions could be a direct or indirect manifestation of Texas's eagerness to inhibit federal policy. Arguably there is no extant federal policy to thwart, save for the generalized federal interest in ensuring that future Defense Department procurement not be hindered. *Cf. Murray v. Murray* 621 F.2d 103, 107 (5th Cir.1980) (suit by divorcee to garnish income owed to ex-husband by Veterans Administration not removable where there is no showing "how the pendency and disposition of the garnishment action in state court could arrest, restrict, impair, or interfere with either the actions of a federal official or the operations of the federal government").

Protection of future procurement is a matter readily dealt with by federal statute or government contractual indemnification. Suppose, however, that the civilian actions were to expose the government to an increase in the cost of future procurement of chemicals for military use. The Supreme Court has recognized a distinct federal interest in protecting future defense procurement, *see Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 2514–15, 101 L.Ed.2d 442 (1988), and one purpose of the government contractor defense is to protect that interest. *Id.* But the hypothesis that tort liability will result in increased procurement costs, while sufficient to establish the presence of a federal interest in these cases, does not support the claim that a state cannot fairly adjudicate cases in which that interest is at issue. It is the concern for state court bias against the federal government that is the ultimate justification for section 1442(a)(1) removal.

From the standpoint of federalism, the mere assertion of a nebulous federal procurement interest

cannot, without further specification, be a basis for removal. Otherwise any state suit against a manufacturer whose product has at one time been diverted and adapted for military use—for example, a nuisance suit against a metal foundry—would potentially be subject to removal, seriously undercutting the power of the state courts to hear and decide basic tort law. Such a result is incompatible with the respect owed to state courts under our federal system.

The point is not that section 1442(a)(1) is necessarily inappropriate to protect the enforcement of federal procurement policy. It is that removal is not appropriate when the civil or criminal suit brought in state court has only a speculative impact on such policy. In this respect the defendants are in an altogether different position from the private insurers which, as Medicare intermediaries, have relied on section 1442(a)(1). *See* cases cited in Part II.B.2.b., *supra*. The insurers act as continuing conduits for government policy and the state court lawsuits had the potential to interfere with an ongoing federal program. The defendants, by contrast, are being sued entirely for past acts in allegedly providing a tainted product to the government.

Remanding the civilian actions also comports with the Supreme Court's most recent treatment of section 1442(a)(1), which found removal appropriate where the claimed federal defense of immunity raises issues "fraught with difficulty and subject to considerable manipulation." *International Primate Protection League v. Administrators of Tulane Educ. Fund*, ___ *U.S.* ___, 111 S.Ct. 1700, 1709, 114 L.Ed.2d 134 (1991). The Military contractor defense raises straightforward common law tort issues that the state

courts are as adept at handling as the federal judiciary. Likewise, the Defense Production Act issue turns on basic questions of statutory interpretation.

Implicit in the parties' arguments is their assumption that, on remand, the civilian plaintiffs might obtain a judgment or settlement in a Texas state court in excess of that received by veterans whose actions were settled in 1984. Such a result might be seen by some as but another denigration of the Vietnam veteran. Others would argue that what is more accurately revealed is the special responsibility of a nation's political bodies for its returning soldiers. As Judge Cardozo advised, courts may "take judicial notice ... that since the beginnings of our history, a sense of the moral obligation to give aid to the returning soldier has been felt and acted on by government." *New York v. Westchester County Nat'l Bank,* 231 N.Y. 465, 486, 132 N.E. 241 (1921) (dissenting opinion) (citation omitted). In this vein, it should be noted that the Department of Veterans Affairs and Congress have taken significant steps to alleviate the special problems of veterans as contrasted with those of civilians who worked alongside members of the armed forces. *See Agent Orange Act of 1991,* Pub.L. No. 102–4, 105 Stat. 11 (1991); 38 C.F.R. § 3.311a (1990) (Department of Veterans Affairs regulations establishing official "presumption" of connection between certain illnesses and military service in Vietnam); *In re "Agent Orange" Prod. Liab. Litig.,* 781 F.Supp. 902 (E.D.N.Y.1991) (describing recent statutory and administrative developments). In any event, the possibility of a result more favorable to the civilian plaintiffs is present regardless of whether their action is heard in state or federal court. Equitable considerations, therefore, do not counsel against remand.

III. APPEAL OF REMAND

[13] 28 U.S.C. § 1447(d) was added in 1949 to the Judicial Code of 1948. As first enacted, it read: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In 1964, the provision was amended so as not to apply to civil rights suits. The statute now reads:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1447(d)'s prohibition applies whenever the district court remands for lack of subject matter jurisdiction under 28 U.S.C. § 1447(c). *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1976); *In re Pan American Corp.*, 950 F.2d 839, 842 (2d Cir.1991). If the district court remands for reasons not specified in section 1447(c), mandamus or other forms of appellate review may be appropriate. *Thermtron*, 423 U.S. at 351–53, 96 S.Ct. at 593–94 (mandamus proper where district court ordered remand to ease crowded docket); *Karl Koch Erecting Co. v. New York Convention Cent. Dev. Corp.*, 838 F.2d 656, 658 (2d Cir.1988) (remand order based on forum selection clause reviewable because clause does not oust court of subject matter jurisdiction).

Since this case is to be remanded for lack of subject matter jurisdiction, review appears to be barred by a

literal reading of 28 U.S.C. § 1447(d). This is an unfortunate result given the closeness of the case and the particular provision under which removal is sought. 28 U.S.C. § 1442, after all, is premised on the need for the federal courts to protect federal interests from possible state interference. In light of this concern, it would be useful for the parties and the district courts in this Circuit to have an authoritative pronouncement from the Court of Appeals, which has not yet had occasion to consider the "person acting under" provisions of section 1442(a)(1).

Recent case law from other circuits suggests that a path out of this quandary lies in 28 U.S.C. § 1292(b). In relevant part, that section provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action, may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order....

An early Tenth Circuit case held that section 1292, although passed subsequently to section 1447(d), was not intended to modify or supersede the latter. *See In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir.1959); *accord Dawson v. Orkin Exterminating Co.*, 736 F.Supp. 1049 (D.Colo.1990); J. Moore & B. Ringle,

1A *Moore's Federal Practice* ¶ 0.169[2.-1], at 688–90 (2d ed. 1991). More recent authority from the Third and Ninth Circuits maintains a contrary view, allowing review of orders of remand when the grounds for remand are certified for immediate appeal. *See In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 838–48 (3d Cir.1991) (review of remand for lack of subject matter jurisdiction appropriate where issue controlling remand is certified for appeal and order of remand is stayed pending outcome of appeal), *petition for cert. filed*, 60 U.S.L.W. 3344 (Oct. 23, 1991) (No. 91-676); *National Audubon Soc'y v. Department of Water*, 869 F.2d 1196, 1205 (9th Cir.1988) (same). The district and appellate court opinions in the TMI case are particularly useful for their detailed analysis of the interrelation of sections 1292 and 1447(d). *See In re TMI Litigation*, 940 F.2d at 838–48; *In re TMI Coordinated Proceedings*, 735 F.Supp. 640, 646–48 (M.D.Pa.1990), *vacated on other grounds*, 940 F.2d 832 (3d Cir.1991).

[14] In the present case, there is a controlling question of law and a substantial ground for difference of opinion as to the appropriateness of defendants' attempt to remove under section 1442(a)(1). This question controls the extent of federal subject matter jurisdiction in this and like cases where important federal interests may be at stake. An immediate appeal might materially advance termination of the litigation by preventing remand and leaving the case in the present forum, where considerable materials are already in the record available for judicial notice. The court therefore certifies for immediate appeal the issue of section 1442(a)(1)'s availability for natural or legal persons providing goods and services to the government under conditions of the sort described in

this case. "Certification is made recognizing that the first question for appellate resolution will be whether § 1292(b) review is available under these circumstances." *In re TMI Coordinated Proceedings*, 735 F.Supp. at 648.

IV. CONCLUSION

The defendants have not met their burden of establishing that they were "person[s] acting under" federal officers within the meaning of section 1442(a)(1). No other basis for federal subject matter jurisdiction having been shown, the actions of Charles Brown and Clarence White are remanded to Texas state court. The court's order of remand is stayed pending completion of appeals.

So ordered

APPENDIX G

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED OCTOBER 4, 1991 AS AMENDED NOVEMBER 15, 1991

MEMORANDUM AND ORDER

MICHAEL F. RYAN, et al., *Plaintiffs*,
-against-
DOW CHEMICAL COMPANY, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal Inc., and Thompson Chemicals Corporation, *Defendants*.

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

SHIRLEY IVY, et al., *Plaintiffs*,
-against-
DIAMOND SHAMROCK CHEMICALS COMPANY, et al., *Defendants*.

Ronald L. HARTMAN, et al., *Plaintiffs*,
-against-
DIAMOND SHAMROCK CHEMICALS COMPANY, et al., *Defendants*.

Nos. 79 Civ. 747, 89 Civ. 3361 and 90 Civ. 3928
MDL No. 381

United States District Court, E.D. New York

October 4, 1991
As Amended November 15, 1991

Robert M. Hager, Washington, D.C., for Ivy plaintiffs.

Kelly L. Newman, Houston, Tex., for Hartman plaintiffs.

Cadwalader, Wickersham & Taft by Michael M. Gordon, New York City, for Diamond Shamrock Chemicals Co.

Clark, Gagliardi & Miller by Morton B. Silberman, White Plains, N.Y., for T.H. Agriculture & Nutrition Co., Inc.

Lord Day & Lord, Barrett Smith by John C. Sabetta, New York City, for Monsanto Co.

Kelley, Drye & Warren by William C. Heck, New York City, for Hercules Inc.

Rivkin, Radler, Bayh, Hart & Kremer by Steven Brock, Uniondale, N.Y., for Dow Chemical Co.

Shea & Gould by Myron Kalish, New York City, for Uniroyal, Inc.

WEINSTEIN, District Judge:

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Plaintiffs consist of two groups: first, those veterans and family members within the class covered by the *Agent Orange* class action pending in this court, and second, civilians claiming injury from Agent Orange who were never members of the class. Defendants are the same as those in the class action.

The current suits began as state court actions in Texas. They were removed to the federal court in Texas and then transferred by the Multidistrict Panel to the Eastern District of New York. Plaintiffs now

seek to remand their actions to Texas state court for lack of federal subject matter jurisdiction. Defendants move to dismiss plaintiffs' claims or for an injunction prohibiting plaintiffs from continuing their actions.

As explained in this memorandum, the plaintiffs who are members of the Agent Orange class must have their suits dismissed; they are free to share in the proceeds of the class action settlement to the extent they can demonstrate entitlement under the distribution plans being administered by the court. As it pertains to the civilian plaintiffs—who are not members of the class—the plaintiffs' motion to remand raises issues concerning the scope of 28 U.S.C. § 1442(a)(1) that require further consideration. These issues will be addressed in a separate memorandum.

I. INTRODUCTION

A. *Agent Orange Litigation: 1979–1984*

The current controversy is part of a continuing litigation whose first phase ended in settlement after six years of effort by scores of lawyers and many court officers—special masters, magistrates, and judges. Among the hundreds of published and unpublished decisions, *see In re "Agent Orange" Prod. Liab. Litig.*, 475 F.Supp. 928 (E.D.N.Y.1979) (dismissing federal constitutional and statutory claims, reserving possible federal common law claims, denying motion to limit communications to third parties); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 737 (E.D.N.Y.1979) (finding subject matter jurisdiction on basis of federal common law issues), *rev'd*, 635 F.2d 981 (2d Cir.1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct.

980, 71 L.Ed.2d 116 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 28 Fed.R.Serv.2d (Callaghan) 993 (E.D.N.Y.1980) (granting motion of terminally ill plaintiff to videotape his own deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 750 (E.D.N.Y.1980) (ordering government to refrain from destruction of documents pursuant to internal procedure); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 753 (E.D.N.Y.1980) (various orders concerning modification of complaint and answers); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 754 (E.D.N.Y.1980) (ordering videotaped deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 756 (E.D.N.Y.1980) (establishing agenda for status conference); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 757 (E.D.N.Y.1980) (requiring plaintiffs to file individual notices to retain right to bring actions against federal government); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 762 (E.D.N.Y.1980) (dismissing claims against government as third-party defendant, establishing case management plan, conditionally certifying Rule 23(b)(3) class, and denying defendants' motion for summary judgment); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 616 (E.D.N.Y.1981) (establishing committee to review procedures for videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618 (E.D.N.Y.1981) (allowing motion to amend caption, denying motion to amend complaint, denying defendants' motion for summary judgment on "government contractor" defense); *In re "Agent Orange" Prod. Liab. Litig.*, 93 F.R.D. 514 (E.D.N.Y.1982) (allowing defendant to proceed with scheduled destruction of documents); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F.Supp. 1046 (E.D.N.Y.1982) (denying reargument on dismissal of government as third-party defendant, denying inter-

locutory appeal, provisionally dismissing claims against non-manufacturer defendants, denying motion to form steering committee for plaintiffs' counsel, denying motion for decertification of class, deferring decision on statute of limitations issues, and establishing elements of government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 537 F.Supp. 977 (E.D.N.Y.1982) (provisionally dismissing claims against non-manufacturer defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y.1982) (appointing special master to supervise discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 544 F.Supp. 808 (E.D.N.Y.1982) (denying motion to disqualify defense attorneys; provisionally dismissing claims against certain non-manufacturer defendants, and denying motion to implead suppliers); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 191 (E.D.N.Y.1982) (clarifying that denial of motion to implead suppliers was without prejudice); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 192 (E.D.N.Y.1982) (affirming special master's ruling as to location of depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578 (E.D.N.Y.1983) (adopting special master's protective order for discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y.1983) (rejecting first amendment challenge to protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 587 (E.D.N.Y.1983) (adopting with modifications special master's order regarding videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y.1983) (adopting protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y.1983) (adopting special master's protective order for Department of Agriculture documents); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427

(E.D.N.Y.1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 541 (E.D.N.Y.1983) (denying interlocutory appeal of decision deferring certification of class and determination of appropriate notice); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 542 (E.D.N.Y.1983) (affirming special master's denial of discovery request); *In re "Agent Orange" Prod. Liab. Litig.*, 565 F.Supp. 1263 (E.D.N.Y.1983) (granting summary judgment for four defendants on government contractor defense; denying summary judgment for other defendants); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y.1983) (adopting order of special master concerning discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y.1983) (adopting special master's order to unseal documents in connection with summary judgment motions); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 554 (E.D.N.Y.1983) (denying request for reconsideration of order to unseal documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y.1983) (ordering special master to review discovery decisions in light of court's decision to try causality and liability issues); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 558 (E.D.N.Y.1983) (approving special master's order of additional discovery to clarify circumstances surrounding document destruction); *In re "Agent Orange" Prod. Liab. Litig.*, 570 F.Supp. 693 (E.D.N.Y.1983) (clarifying program for discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 571 F.Supp. 481 (E.D.N.Y.1983) (granting motion of law firm to be relieved as lead counsel for plaintiffs and appointing new plaintiffs' management committee); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 338

(E.D.N.Y.1983) (approving discovery recommendations of special master); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 645 (E.D.N.Y.1983) (lifting prior protective order applying to government documents obtained during discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y.) (certifying Rule 23(b)(3) and Rule 23(b)(1)(B) classes), *appeal denied*, 100 F.R.D. 735 (E.D.N.Y.1983), *mandamus denied*, 725 F.2d 858 (2d Cir.1984), *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 778 (E.D.N.Y.1984) (denying motion to implead suppliers of chemical components); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y.1984) (finding national consensus law on issues of liability, government contractor defense and punitive damages); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 1242 (E.D.N.Y.) (reinstating third-party plaintiffs' claim for indemnity against government with respect to claims of veterans' wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir.), *appeal denied*, 745 F.2d 161 (2d Cir.), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97 (E.D.N.Y.1984) (ordering *in camera* disclosure of names of scientists deleted from government report); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740 (E.D.N.Y.1984) (approving settlement of class action subject to fairness hearings); *In re "Agent Orange" Prod. Liab. Litig.*, 603 F.Supp. 239 (E.D.N.Y.1985) (dismissing claims of veterans' wives and children against government), *aff'd in part, vacated in part*, 818 F.2d 201 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y.1985) (modifying protective orders); *In re*

"Agent Orange" Prod. Liab. Litig., 105 F.R.D. 577 (E.D.N.Y.1985) (affirming with modification magistrate's order that defendants in two non-settled cases produce deponents); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1221 (E.D.N.Y.1985) (dismissing defendants' claim for indemnity from government for settlement payments to veterans' families), *aff'd*, 818 F.2d 204 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1223 (E.D.N.Y.1985) (ruling as to admissibility of opt-out plaintiff's scientific evidence and expert testimony and granting summary judgment in favor of defendants for plaintiffs' failure to establish causation), *aff'd*, 818 F.2d 187 (2d Cir.1987), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1267 (E.D.N.Y.1985) (same), *aff'd*, 818 F.2d 187 (2d Cir.1987), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1285 (E.D.N.Y.1985) (dismissing action brought by Hawaiian civilians), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1290 (E.D.N.Y.1985) (dismissing claim of civilian physician for failure to demonstrate exposure to herbicides), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1296 (E.D.N.Y.1985) (determining class-action plaintiffs' attorney fees and reaffirming settlement); *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1396 (E.D.N.Y.1985) (establishing plan for disbursement of settlement fund pending appeals), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir.1987); *In re "Agent Orange" Prod.*

Liab. Litig., 611 F.Supp. 1452 (E.D.N.Y.1985) (denying motion to set aside attorney fee-sharing arrangement), *rev'd in part*, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 623 (E.D.N.Y.1985) (approving settlement of class action and dismissing with prejudice claims of class members); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 625 (E.D.N.Y.1985) (approving plan for Australia and New Zealand); *In re "Agent Orange" Prod. Liab. Litig.*, 787 F.2d 822 (2d Cir.1986) (dismissing claims of non-class plaintiffs against defendant not named in complaints); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14 (2d Cir.1986) (denying motion to disqualify plaintiffs' attorneys from appealing settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 804 F.2d 19 (2d Cir.1986) (denying repeal of stay on settlement funds pending appeal); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F.Supp. 1250 (E.D.N.Y.1988) (modifying class assistance program as required by 818 F.2d 179 and granting opt-out plaintiffs opportunity to opt into class for purposes of benefiting from settlement fund).

Narratives of these events are in print. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 148-61 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988). Nevertheless, a brief recapitulation of certain aspects of this history is desirable as background to the current phase of the *Agent Orange* litigation saga.

While in the service of their country, hundreds of thousands of military service personnel were exposed to the defoliant Agent Orange, which contained trace elements of dioxin. Lawsuits on behalf of

veterans proliferated throughout the country starting in 1978. The suits—as much a demand for compensation as a political protest of the treatment of Vietnam veterans by the government and public at large—were brought against the various manufacturers of defoliants, who in turn impleaded the federal government. Between two and three million members of the armed forces who served in or near Vietnam as well as their families were potential plaintiffs.

In 1979, the Judicial Panel on Multidistrict Litigation transferred as MDL 381 over 600 cases involving about 15,000 plaintiffs to the Eastern District of New York for coordinated and consolidated pretrial proceedings. In the initial proceedings of MDL-381, the court denied defendants' motion to dismiss for lack of subject matter jurisdiction because the complaint raised questions of federal common law. *See* 506 F.Supp. at 737. When the Second Circuit Court of Appeals reversed this ruling, *see In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir.1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981), the litigation became a suit predicated on diversity jurisdiction.

In December of 1980, the court granted the federal government's motion to be dismissed as a third-party defendant on the basis of sovereign immunity. 506 F.Supp. at 762. It also denied plaintiffs' motion to create a "limited fund" class action under Federal Rule of Civil Procedure 23(b)(1)(B), and instead indicated that it planned to certify a "common question" class under Rule 23(b)(3). *Id.* In addition, the court denied the defendants' motion to dismiss on the ground that the production of defoliants was ordered by, and met the specifications of, the federal government (the

"military contractor defense"). The court indicated the defendants could later attempt to prove the applicability of the defense. *Id.* Following discovery, the court granted, but did not enter, summary judgment on the military contractor defense for some but not all defendants. 565 F.Supp. at 1263.

In December of 1983, the court certified two classes of plaintiffs and scheduled a trial to commence in May of 1984. A Rule 23(b)(3) class with opt-out rights was created to try the fundamental common question of the causal relationship between dioxin and plaintiffs' injuries. 100 F.R.D. at 718. In addition, a Rule 23(b)(1)(B) limited fund class without opt-out rights was created to cover plaintiffs' punitive damage claims. *Id.* The 23(b)(3) class was defined as

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides.... The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Pursuant to Rule 23(c)(2), the court ordered plaintiffs' counsel to notify class members by mail where possible, and by radio, television, magazine, and newspaper announcements throughout this country, Australia, and New Zealand. The mailings and announcements informed class members that they would be bound by the class action unless they forwarded a written request for exclusion to the clerk of the court by May 1, 1984. *Id.* at 732. Fewer than

2,500 servicepersons filed opt-out requests. *See* 597 F.Supp. at 756.

B. *The Settlement Agreement*

On May 7, 1984, a tentative settlement was forged. According to its terms, the defendants agreed to pay the class $180 million in final settlement of all claims arising out of exposure to Agent Orange then or in the future. Concerned with the potential for new actions and recognizing the need for finality, the Settlement Agreement expressly stated that "[t]he class specifically includes persons who have not yet manifested injury." 597 F.Supp. at 865.

The Settlement Agreement provided that the $180 million be paid into a Settlement Fund to be established, maintained, and administered by the court. The agreement also required the court to retain jurisdiction over the Settlement Fund pending its final disposition. *Id.* at 866. The exclusive remedy provided for all class members was a claim against the Settlement Fund. Under the Settlement Agreement, class members were forever barred from instituting or maintaining any action against defendants arising out of or relating to, or in the future arising out of or relating to, exposure to Agent Orange. The Settlement set aside $10 million of the $180 million to indemnify the defendants from any judgments obtained in state court actions by members of the class alleging harm caused by exposure to Agent Orange in or near Vietnam. Any part of the indemnity fund not used reverts to the benefit of the class members.

The Settlement Agreement was preliminarily approved on January 7, 1985. *See id.* at 862. Notice of the proposed settlement was given to the class. Following eleven days of fairness hearings in five cities, the court granted final approval of the Settlement Agreement on June 18, 1985. 611 F.Supp. at 1347. Subsequently, the court issued an Order and Final Judgment of Dismissal which: (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of the class action; and (3) retained the court's jurisdiction over the class action for the purpose of maintaining, administering, and distributing the Settlement Fund. *See* 618 F.Supp. at 624.

C. *Dismissal of Opt-Out Claims*

After the court preliminarily approved the Settlement Agreement, most of the original 2,500 opt-outs chose to opt back into the class. Two hundred and eighty-two servicepersons did not. *See* 611 F.Supp. at 1230. Their claims were embodied in seventeen different cases.

Summary judgment was granted against each opt-out plaintiff on the grounds, *inter alia*, that none could prove by the probability demanded in tort litigation that his or her ailment was caused by Agent Orange, *see* 611 F.Supp. at 1260-63; 611 F.Supp. at 1284-85, and that all the claims were barred by the military contractor defense. *See* 611 F.Supp. at 1263-64; 611 F.Supp. at 1285.

D. *Appeals*

Various district court rulings including the final judgment were appealed to the Court of Appeals for the Second Circuit. The rulings included orders certifying the class action, approving the Settlement Agreement, outlining the distribution plan, awarding counsel fees, granting summary judgment against the opt-out claimants, dismissing untimely claims, and dismissing all claims of class members who objected to the Settlement Agreement. Specifically assigned as errors were the inclusion in the class definition of persons with latent or "after-manifesting" injuries, the sufficiency of the notices of class certification and settlement of the action, the adequacy of the Settlement Fund, and the propriety of the distribution plan.

In nine unanimous opinions date April 21, 1987, the Court of Appeals disposed of all of the numerous individual appeals except those from the order of the district court providing for public access to documents sealed from public view during discovery. Petitions for rehearing were denied. The Court of Appeals approved the settlement and multiple petitions to the United States Supreme Court were denied.

Specifically, the Court of Appeals affirmed the adequacy of notice, the adequacy of the representation given the absent class members, the fairness of the settlement, and the dismissal of the opt-out plaintiffs' claims. *See* 818 F.2d 145 (affirming class certification, adequacy of notice to class, and approving settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir.1987) (approving Veteran Payment

Program but rejecting Class Assistance Program as an organization operated independently of the court); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir.1987) (affirming summary judgment against opt-out plaintiffs), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed. 2d 932 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir.1987) (affirming dismissal of Federal Tort Claims Act claims of servicepersons and their relatives); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir.1987) (affirming dismissal of "direct" claims against the United States brought by wives and children of servicepersons), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204 (affirming dismissal of manufacturers' claim for indemnity against United States for settlement payments); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210 (2d Cir.1987) (affirming dismissals of Hawaiian civilians' actions), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.) (rejecting plaintiff class attorneys' fee-sharing agreement and reinstating in part fee award determination of district court), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226 (2d Cir.1987) (affirming district court's calculations of attorney fees but reinstating certain fees against which district court had offset discovery costs).

II. OPERATION OF THE SETTLEMENT FUND

The court outlined its proposed plan for the use of the Settlement Fund in May of 1985. 611 F.Supp. at 1396. On July 5, 1988, the court announced the final plan for distribution. 689 F.Supp. at 1250. At that

time, the fund had approximately $240 million in assets. Some $13 million was used for attorney fees. Five million dollars was set aside for the benefit of veterans from Australia and New Zealand. $170 million was allocated to the Agent Orange Veteran Payment Program designed to compensate disabled veterans and their survivors. The Payment Program compensates for the death or disability of any class member that occurs on or before December 31, 1994 or until the Plan's funds run out, whichever comes first.

Another $42 million was designated to the Agent Orange Class Assistance Program. It distributes funds in the form of grants to organizations that provide services to children with birth defects and their families and assistance to Vietnam veterans who are not otherwise able to obtain needed assistance. The $10 million indemnity fund will be added to the fund for the Class Assistance Program if it is not used for state litigation prior to 1994.

A. *Veteran Payment Program*

In light of the dismissal of the claims of the opt-out plaintiffs, the court ruled, as a matter of equity, that any person who had opted out of the class action settlement was automatically eligible to participate in the Payment Program unless he or she "opted-out" a second time by January 1, 1989. *See* 689 F.Supp. at 1262. Initially, the court required a veteran or his or her survivor seeking compensation from the Payment Program to request an Application Kit within 120 days of learning of the death or injury or by January 1, 1989, whichever was later. The date was extended and then abolished altogether as a condition

for sharing in the fund. All fully completed applications received prior to the termination of the Program will be considered timely. Berman, *The Agent Orange Veteran Payment Program*, 53 Law & Contemp. Probs. 49 (1990), provides an account of the basic operation of the Program.

As of September 30, 1991, the Payment Program has received applications from more than fifty thousand persons. Approximately 80% of these applications were filed by veterans seeking disability payments; the other 20% were filed by surviving family members. The following chart outlines the status of the applications:

Number approved and paid	26,727
Number denied	19,882
Number pending	1,967
Number inactive	5,191
Total	53,767

See Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, Third Annual Report (October, 1991). As of September 30, 1991, a total of $86,255,351 had been disbursed to eligible applicants under the Payment Program.

About 80% of the claims submitted to the Payment Program are disability claims. Of these, 12,091 (roughly 28%) resulted from disabilities occurring after May 7, 1984 (the settlement date). 9,350 of those claims have been approved for payment. The remaining 20% of filed claims are for survivor payments. Of these, 6,350 (about 53%) are for deaths occurring after May 7, 1984. 4,242 of these claims have been approved. *See Third Annual Report, supra.*

Applicants who disagree with the disposition of their applications may file an appeal with the court-appointed Special Master for Appeals. As of September 19, 1991, 10,396 appeals had been filed and a total of 9,816 decisions had been rendered. Of the decisions on appeal, 6,890 affirmed the determination below and 2,926 overruled or modified the decision. For each case, the court's approval is required before the Special Master's determination becomes final.

In overseeing the Payment Program the court has received thousands of letters and telephone inquiries from veterans or their families. Many seek information about the processing of their claims; others request specific relief such as an advance payment because of hardship or necessity. The court responds to each inquiry by either contacting the disbursing agent for the Agent Orange Payment Program, the Special Master for Appeals, or, where appropriate, granting the requested relief. As mentioned above, the court has passed upon almost 10,000 appeals in individual cases. It receives frequent reports from the bodies administering the program and its financial advisors. All disbursements from investment funds are approved by the court. It is also in frequent contact with Special Master Kenneth Feinberg about such matters as the successful legislative and administrative decisions to exempt settlement funds from taxation and from liens of the Department of Veterans Affairs and others. The court has also consulted with the Advisory Board to the Payment Program, which is composed of veterans Albert S. Dandridge, III, Esq., Donna-Marie Boulay, Esq., Charles T. Hagel, Vincent Martin, and John McElrath.

B. *Class Assistance Program*

The Class Assistance Program provides services to large numbers of possibly exposed veterans and their families with special emphasis given to children with birth defects. The Program is administered by the court with the advice of Executive Director Dennis K. Rhoades, Deputy Director Michael Leveck, and a board of unpaid Vietnam veteran advisors currently consisting of Rev. Robert Certain, Steven Champlin, Ronald Gardner, Charles T. Hagel, Mary Lou Keener, Gary E. May, Frank McCarthy, Hon. Matthew Railey, Dr. Oscar Salvatierra, and Solomon B. Watson, IV.

Continuing supervisory responsibility requires the court to review each of the proposed grants. The court also attends regular meetings with the Executive Director and advisory board. The Executive Director reports to, and requests advice and authority from, the court in specific matters in frequent phone and face-to-face consultations. The court also has physically inspected the operation of a number of the institutions funded by the program and meets with the leaders of many more of these organizations.

Since its inception, the Class Assistance Program has awarded 134 grants worth a total of almost $24 million. Of these grants, 71 are active, providing $13.5 million in services to veterans and their families in 46 states. *Third Annual Report of the Agent Orange Class Assistance Program* (October 3, 1991). Recipients include local and national Vietnam veterans' groups, agencies serving adults and children with disabilities, and agencies providing family counseling. *See* Appendix 1. The various programs in these areas

provide services ranging from counseling and other direct assistance to help in obtaining services and benefits from government and private providers for which veterans and their families are eligible. *See* Appendix 2. All organizations that receive funds file quarterly reports and undergo annual evaluations both the assist them in achieving their goals and to ensure that grant money is being used effectively. The Class Assistance Program estimates that, in the last three years, grantee-organizations have served about 46,000 veterans and family members. *See* Appendix 3.

In the summer of 1991, students from Touro Law School, volunteers, and Program staff examined some 250,000 claims files of the court and obtained the names of about 75,000 birth-disabled children of Vietnam veterans who may have been exposed to Agent Orange. Their families will be contacted in an attempt to assist them with the network of social and medical agencies cooperating with the Class Assistance Program.

The staff of the Class Assistance Program, working with state bodies, veterans' groups, academic institutions, and national and local social service institutions, also conducts training programs. A major thrust of these programs is to educate agencies and workers in the helping professions on the needs of veterans as family members.

III. THE PRESENT ACTIONS

The two actions in which motions to remand are pending are, in effect, a direct challenge to the validity of the settlement and the programs now financed

by the Settlement Fund. Those plaintiffs who are class members have now sued the same chemical companies who were defendants in the original *Agent Orange* litigation on the same grounds and for the same relief as was originally sought and compromised in the class action. If plaintiffs are successful, they will automatically reduce the sums available for other class members, since the terms of the settlement set aside $10 million for indemnification of the defendants against suits of this kind.

In starkest terms, the cases present the question of whether members of a class whose action was brought and is still pending in federal court can circumvent the effect of a federal judgment by bringing new actions in a state court relying exclusively on state law. The need to protect other class members, the importance of maintaining the class action as viable litigation device, and the interest of all litigants in the finality of settlements require that the question be answered in the negative.

A. *Hartman I*

In June 1988, *Hartman v. Diamond Shamrock Chemical Co. (Hartman I)* was commenced in Texas state court. The plaintiffs were Ronald Hartman and his wife and children. Mr. Hartman is a Vietnam veteran who was diagnosed in 1988 as having non-Hodgkins lymphoma. His children, Jeffrey Alan Hartman and Angela Marie Hartman, both suffer from birth defects. Katherina Hartman, his wife, claims emotional injury arising out of her husband's and children's conditions.

The Hartman complaint was the same in all substantive respects as the class action complaint in *Agent Orange*. Plaintiffs sought compensatory and punitive damages on behalf of a class of veterans exposed to Agent Orange in Vietnam who allegedly manifested injuries after the May 7, 1984 settlement date or who discovered their injuries after that date. The defendants were the same chemical companies sued in the *Agent Orange* class action. The *Hartman I* action was filed by Benton Musslewhite, Esq., an attorney who participated in the representation of the *Agent Orange* class and signed the Settlement Agreement.

Hartman I was removed to the United States District Court for the Eastern District of Texas. The case was transferred to this court by the MDL panel on February 1, 1989. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL-381 (J.P.M.D.L. Feb. 1, 1989) (unpublished order). At plaintiffs' request, this court dismissed the *Hartman I* action without prejudice on September 25, 1989.

B. *Ivy and Hartman II*

In May 1989, a group of 34 plaintiffs commenced *Ivy v. Diamond Shamrock Chemicals Co.* in Texas state court. Like the *Hartman I* plaintiffs, most of the plaintiffs in *Ivy* assert that they suffered injuries as a result of exposure to Agent Orange during service in the Armed Forces in Vietnam and that their injuries did not manifest themselves or were not discovered until after May 7, 1984. Charles Jardon, Gary Thomas, James Kent, Earl Thompson, James Donald Deloatch, and Emile Annibolli claim injury from exposure to Agent Orange during military service in Vietnam

from 1963 to 1971. Family members include Shirley Ivy, Verda Wilson, Shirley Zalewaski, Dawn Marie Inman, Peggy Sands, Ursula Margot Parry, and Laura Jenkins, who bring actions on behalf of themselves and the estates of deceased veterans Donald Ivy, Isaiah Wilson, Jr., Yen Zalewaski, Bobby Joe Inman, Martin Sands, James D. Parry, Sr., and Eddie Jenkins. Toni K. Jardon, Charles Jardon, Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Mary Lee Thomas, Emma Kent, Judy L. Thompson, and Joyce Deloatch also sue as family members. All of these plaintiffs fall within the class as defined in the original *Agent Orange* litigation.

Two of the claimants in the *Ivy* action allege injuries from exposure to Agent Orange while acting in a civilian capacity. Charles Brown and Clarence White (whose estate is being represented by James White) served as civilian employees in Vietnam and claim to have been injured from exposure to Agent Orange. Since these civilian plaintiffs did not serve in a military capacity, they are not members of the class bound by the 1984 settlement and order.

There is some confusion as to representation of some of the *Ivy* plaintiffs. Robert Hager, Esq. only claims to represent Donald Ivy, Shirley Ivy, James Deloatch, and Joyce Deloatch. The other plaintiffs in the *Ivy* action are represented by counsel in Texas who did not appear in this court.

Shirley Ivy is attempting to be a class representative of a class of veterans and survivors who manifested or discovered injury after the May 7, 1984 opt-out deadline. Ronald Hartman is attempting to do the same in *Hartman II*.

James Deloatch, Joyce Deloatch, Tamara Deloatch, James L. Kent, Sr., Emma Kent, Charles E. Brown, Gary F. Thomas, and Mary Lou Thomas purported to opt out of the *Agent Orange* class by filing notices with the Clerk of the Court in August of 1988. Shirley Ivy also filed an opt-out notice on behalf of herself and her deceased husband, Donald Ivy, with the Clerk of the Court on August 25, 1991.

Some *Ivy* plaintiffs have availed themselves of the Veteran Payment Program. Shirley Zalewaski apparently filed a notice purporting to opt out of the class but later requested an application for the Payment Program. In March 1989, Verda Wilson applied for a survivor payment from the Agent Orange Veteran Payment Program on behalf of her late husband, Isaiah Wilson, Jr. In September she was denied relief but that decision was overruled by the Special Master for Appeals. On January 15, 1991, the court approved payment to her of a survivor award. She received $3,400 in March of this year. In May 1990 Laura Jenkins also applied for survivor payments on behalf of her late husband, Eddie Jenkins. She was approved for payment and received $2,040 in February, 1991. Plaintiffs Ursula Margot Parry and Shirley Zalewaski have applied for payment from the Settlement Fund and have been sent application kits which they have not yet returned.

The *Ivy* complaint, which seeks compensatory and punitive damages for "after-manifested" injuries, expressly disclaims reliance on federal law. Defendants nevertheless removed the *Ivy* action to federal court on federal question grounds.

In April 1990, a second action was filed by the *Hartman I* plaintiffs in Texas state court. With one exception, the complaint in *Hartman II* is essentially identical to *Hartman I;* like the complaint in *Ivy*, it disavows reliance on any right or recovery under federal law. *Hartman II* was also removed to federal court. While the *Ivy* and *Hartman II* actions have not been consolidated, the plaintiffs in both actions will be referred to collectively as "plaintiffs."

In both the *Ivy* and *Hartman II* notices of removal, the defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action "because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction." Second, the court's jurisdiction was invoked "pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption."

On January 31, 1990, the plaintiffs petitioned the United States Court of Appeals for the Second Circuit for a writ of mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The petition was denied on March 28, 1990. *See In re Ivy*, 901 F.2d 7 (2d Cir.1990). The Court of Appeals directed that the issue of subject matter jurisdiction be considered in the first instance by the transferee court. *Id.*

In October 1990, plaintiffs moved in this court for an order remanding both actions to the Texas state courts on the ground that federal subject matter jurisdiction was lacking. In December 1990, defen-

dants moved under the All-Writs Act, 28 U.S.C. § 1651, for an injunction prohibiting the plaintiffs, their attorneys and certain non-parties from prosecuting *Ivy* and *Hartman II* and from commencing any new actions compromised by the Settlement Agreement.

A second mandamus petition that sought to prevent this court from ruling on the merits of the case was denied without opinion in December 1990. *In re Ivy*, No. 90-3065 (2d Cir. Dec. 12, 1990). A third mandamus petition seeking relief similar to the second petition was denied in March of 1991. *In re Ivy*, No. 91-3011 (2d Cir. Mar. 5, 1991).

Oral argument on the motion to remand was heard on March 6, 1991. Given the complexity of the legal issues and the questions posed by the court, time for further briefing was requested by the defendants. The motion to remand and any additional dispositive motions were rescheduled to be heard on May 6, 1991.

Prior to the May 6 return date, defendants moved to dismiss plaintiffs' claims. Defendants further moved for leave to amend their notice of removal to add 28 U.S.C. § 1442(a)(1) (removal of cases involving federal officer or persons acting under such officer) as a basis for jurisdiction. Plaintiff Hartman moved for an order consolidating the *Ivy* and *Hartman II* actions for trial purposes.

On May 6, 1991 the court heard oral argument on the following motions:

1. Plaintiffs' motion to remand to the Texas state courts.
2. Defendants' motion under the All-Writs Act for an injunction prohibiting further state court litigation.
3. Defendants' motion to dismiss.
4. Defendants' motion for leave to amend the notice of removal to add an additional basis for jurisdiction.

At the hearing, the parties requested additional time for supplemental briefing. The court gave the plaintiffs until July 6, 1991 and the defendants thirty days from that date. No further argument was scheduled. Plaintiffs requested and received a two-month adjournment to September 6. A further application for another 30 day extension was made by the plaintiff on August 28, 1991; it was denied in view of the desirability of a final decision.

Defendants most recently requested still more time to respond to plaintiffs' extensive scientific submissions. The court granted thirty days to both parties to supplement their scientific documentation. While the court believes the scientific contentions on both sides are irrelevant, and, if relevant, not dispositive, the parties desired to make a record for purposes of appeal. The court saw no reason to deny them that opportunity.

IV. LAW

A. *Subject Matter Jurisdiction*

[1,2] The sole basis advanced to justify remand is the alleged lack of federal subject matter jurisdiction.

Since diversity jurisdiction is lacking and the complaints disavow reliance on federal law, plaintiffs maintain that the cases belong in state court. With respect to all the plaintiffs who fall within the definition of the class in the *Agent Orange* litigation, this position is without merit. This court retained jurisdiction over the class action and has authority to ensure that its prior orders and the Settlement Agreement are enforced. If an independent basis for jurisdiction were necessary, the complaint itself calls into question federal law by undermining a final federal class action judgment.

The two civilian plaintiffs in *Ivy* are, however, in a separate category. They are not members of the class and are therefore not bound by the Settlement Agreement. Their cases are severed from the claims of the remaining plaintiffs. The question of the court's jurisdiction over these plaintiffs will be addressed in a separate memorandum. For the purposes of the remainder of this opinion, references to plaintiffs does not include the civilian plaintiffs.

1. Adequacy of Notice of Removal

[3,4] Defendants' removal was proper because the court retains jurisdiction over the Settlement Agreement and because it must enforce its bar on subsequent suits by class members against the defendants. In addition, plaintiffs' state law complaint is an artfully pleaded attempt to avoid a prior binding federal judgment. Defendants' removal notices in *Ivy* and *Hartman II* expressly identify only the last of these grounds. Although the notices are somewhat less clear than they might have been as to the other bases of subject matter jurisdiction, this court is

charged with the duty, consistent with the general rules of notice pleading, to construe removal notices, like all pleadings, liberally and in accord with substantial justice. *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir.1965), *aff'd*, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160, 163-64 (S.D.N.Y.1965); *cf. Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 85 (2d Cir.1990) (court will look beyond face of complaint to establish diversity jurisdiction), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1430, 113 L.Ed.2d 484 (1991). Jurisdiction on grounds not explicitly stated in the notice of removal is appropriate where the grounds are implicit in the situation. *See Walker v. Gibson*, 604 F.Supp. 916, 919 (N.D.Ill.1985); *Harper v. National Flood Insurs. Ass'n*, 494 F.Supp. 234, 236 (M.D.Pa.1980).

Defendants' notices properly stated one adequate ground for removal: plaintiffs' artful pleading to avoid a final federal judgment. Defendants' claims that plaintiffs' actions are removable under the doctrine of federal preemption and have already been asserted in federal court in a pending federal action, taken in context, support the additional grounds discussed below.

2. Court's Retained Jurisdiction

[5] Plaintiffs are members of the *Agent Orange* class. The veterans all served in Vietnam between 1961 and 1972 and claim injuries from exposure to the herbicide. Family member claimants also fall within the plain terms of the class. For all of these plaintiffs, the Settlement Agreement compromised their claims. By bringing new actions in state court,

the plaintiffs seek to avoid the effect of the Settlement Agreement and the judgment issued by this court.

[6] A federal court retains the power to enforce and to consider challenges to settlements entered into in cases originally filed with the court. *See Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 932 (3d Cir.1984), *cert. denied*, 469 U.S. 1190, 105 S.Ct. 962, 83 L.Ed.2d 968 (1985); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir.1975), *cert. denied*, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976). If there is no independent basis for jurisdiction, absent some special need of the parties, the settlement must have been "incorporated into an order of the court," *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1303 (4th Cir.), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978), or there must have been a "deliberate retention of jurisdiction, as by issuing an injunction or by stating that jurisdiction is retained for a particular purpose." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir.1985); *see United SteelWorkers v. Libby, McNeil & Libby*, 895 F.2d 421, 423 (7th Cir.1990); *cf. Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.) ("Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic."), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976).

By any standard this court has jurisdiction over both removed actions: a state suit will reduce the funds available to the class, providing a special need for exercise of federal jurisdiction; the settlement now sought to be circumvented by plaintiffs was em-

bodied in a judgment of this court after full fairness hearings; and, since the class action is still pending in this court, jurisdiction was deliberately retained and is being exercised.

The practical effect of the new actions will be harmful to other class members. Any judgments in state court against the defendants will be paid from the indemnity fund. When parties to a federal action are being adversely affected, the court may not allow its judgment and orders to be flouted. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir.1974) (court has duty to enforce settlement it approved). This is especially true in class actions. "In a class action, the district court has a duty to see that any settlement it approves is completed, and not merely to approve a promise...." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911, 105 S.Ct. 3536, 87 L.Ed.2d 660 (1985).

The Settlement Agreement was incorporated by the court in the decision upholding its fairness, subject to hearings on attorney fees and consideration of plans for distribution. 597 F.Supp. at 862. The Settlement Agreement was also approved "according to its terms" in the court's order and final judgment. 618 F.Supp. at 624-25. In its final order and judgment of dismissal, the court explicitly retained jurisdiction "for the limited purposes of maintaining, administering and distributing the Settlement Fund, pending its final disposition." 618 F.Supp. at 625. That continuing mandate was broadened when the Court of Appeals for the Second Circuit also directed the court to maintain jurisdiction over the Class Assistance

Program and to supervise and manage the distribution of the entire Settlement Fund. 818 F.2d at 185-86.

The intimate involvement of the court with the administration of both the Payment Program and the Class Assistance Program evidences the court's continuing jurisdiction over the class. On a daily basis, the court responds to inquiries of class members. When necessary, it assists them in obtaining compensation from the Settlement Fund. It continues to review the thousands of decisions of the Special Master of Appeals. Each grant developed by the Class Assistance Program is examined and must be approved by the court. Current scientific literature and legislative action are reviewed and made part of the court file. The number of entries on the case docket has grown from approximately 8,000 at the time of settlement to over 13,000 today. These activities are more than sufficient to support a finding that the court retained jurisdiction.

Since the court has retained jurisdiction over the class action it has authority to ensure that the Settlement Agreement it previously approved is enforced according to its terms. Under the circumstances, a new and independent basis for subject matter jurisdiction is not necessary for the court to rule on the merits of plaintiffs' claims. The claims are a challenge to the integrity of the Settlement Agreement and the authority of this court. This court has the power and the obligation to protect and effectuate its orders and final judgments in the *Agent Orange* litigation.

3. Court's Power to Enforce Its Injunction

[7] As Part of the Order and Final Judgment of Dismissal, the court enjoined all class members from commencing any action arising out of or related to exposure to Agent Orange. 618 F.Supp. at 624. The plaintiffs are all members of the class barred from instituting new actions against the settling defendants.

A federal court, as a court of equity, has the authority to enforce its injunction "with or without an explicit reservation of jurisdiction...." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir.1985). "The mandate of an injunction issued by a federal district court runs nationwide, and '[v]iolation of an injunctive order is cognizable in the court which issued the injunction regardless of where the violation occurred.'" *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771 (1986) (citation omitted) (quoting *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir.1963)).

The fact that the judgment is not labeled an injunction is irrelevant. "The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.1980), *cert. denied*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1982). By barring "[e]ach and every plaintiff and member of the...class...from instituting or maintaining any action against any of the defendants," 618 F.Supp. at 624, the court effectively issued an injunction which bars the current actions.

The plaintiffs are all subject to the court's bar against instituting new actions against these defen-

dants. Plaintiffs have violated the court's order by bringing a new action in another forum.

4. Federal Nature of Plaintiffs' Claims

[8, 9] The plaintiff is normally the master of its complaint, and a federal question will not be found if it is not in the complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Nevertheless, this court must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 268-75), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986). An action relying on state law is essentially federal in nature where a plaintiff has had its rights determined by a federal court and the subsequent state action is an attempt to avoid the prior federal judgment. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397 & n. 2, 101 S.Ct. 2424, 2427 & n. 2, 69 L.Ed. 2d 103 (1981).

In *Moitie* plaintiffs brought a federal antitrust action and the claim was dismissed on the merits. Plaintiffs then used the same facts to assert a state law claim against the same defendants. The action was removed to federal court and dismissed on *res judicata* grounds. While there was no federal claim apparent on the face of the complaint, the Supreme Court endorsed the lower courts' finding that the claim was considered "federal in nature" because it was merely an "artful pleading" to avoid the prior federal judgment. *Id.*

The Second Circuit Court of Appeals in clarifying *Moitie* has identified two criteria for determining when a state action will be considered federal in nature. First, the elements of the claim must be "virtually identical" to those in the prior federal action. *Sarkisian*, 794 F.2d at 760. Second, the plaintiff must have chosen the federal forum in the earlier litigation. *Id*. The second element is critical in rendering the state claim "federal" since it implies that "plaintiff's choice of a state forum is motivated by the desire to evade the consequences of prior federal litigation." *Bowlus v. Alexander & Alexander Servs. Inc.*, 659 F.Supp. 914, 918-19 (S.D.N.Y.1987); *see Sarkisian*, 794 F.2d at 760.

Both of the *Sarkisian* criteria are present here. Plaintiffs are members of the *Agent Orange* class action. Although plaintiffs affirmatively disclaim reliance on federal law and assert state law as the sole basis for relief, these claims are identical to the claims raised by the class action complaint. The class plaintiffs chose the federal forum to manage the class action. These new plaintiffs cannot now "abuse the dual court system by filing in state court a second lawsuit...." *Sarkisian*, 794 F.2d at 761.

Plaintiffs object to the application of *Sarkisian* for two reasons. First, they argue that the rule of that case controls only if the first federal court litigation is brought under federal question rather than diversity jurisdiction. Since the *Agent Orange* litigation was a diversity action, plaintiffs contend that it does not fall within the *Sarkisian* rule. While it is true that *Sarkisian* itself involved a prior federal question claim, there is no indication that the Court of Appeals intended to so limit its reach. Such a limit

would be unjustifiable in light of the policy behind the *Sarkisian* doctrine of preventing "double-dipping." Surely it is a worse abuse to litigate *exactly* the same state law claims twice than it is to litigate parallel, though perhaps not identical, federal and state law claims.

Second, the plaintiffs contend that they never "chose" to proceed in the earlier litigation in this court and therefore cannot be said to be seeking avoidance of the Settlement. Since plaintiffs allege that they did not gain definitive knowledge of their membership in the *Agent Orange* class until their injuries manifested after the 1984 opt-out deadline, they argue that, as individuals, they did not actively choose to proceed. But the whole concept of the class action is that it is a representative litigation. If plaintiffs did not choose to litigate, their class representatives chose on their behalf.

In short, the plaintiffs' current actions challenge the viability of Rule 23 of the Federal Rules of Civil Procedure and of class action settlements. If the plaintiffs, as class members, are allowed to undermine a settlement agreement and set aside a federal court's judgment through new state court suits, it is hard to imagine any future defendant in a federal court class action considering settlement since the agreement would always be open to attack by class members in state court.

Because plaintiffs' actions are in reality artful pleadings to avoid a prior federal court decision, this court has jurisdiction over plaintiffs' removed actions.

5. Court's Power to Order Removal

[10, 11] The All-Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions...." *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir.1985); *see In re Joint Eastern & Southern Dists. Asbestos Litig.*, 120 B.R. 648, 656 (E. & S.D.N.Y.1990); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 134 F.R.D. 32, 37 (E. & S.D.N.Y.1990). The Act authorizes federal courts to exercise jurisdiction over persons "'who...are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir.1988) (emphasis omitted) (quoting *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir.1986)), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989). The Act even permits a federal court to remove state court actions to federal court in situations where specific statutory removal authority is absent. *City of Yonkers*, 858 F.2d at 863; *see United States v. New York Tel.*, 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977).

By bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement and the order of this court prohibiting new suits by class members. The new suits are a direct threat to the continuing viability of the judgment settling the class action. The suits will also consume the $10 million set aside to indemnify the settling defendants and reduce the recovery of the remaining class members.

If the cases had remained in state court, the court would have had the authority to order their removal. Moreover, any rulings inconsistent with the prior federal order would have been subject to further injunction by this court. *See City of Yonkers*, 858 F.2d at 864 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir.1974)). Taking jurisdiction of the cases after their voluntary removal is a "less drastic, and therefore preferable result." *City of Yonkers*, 858 F.2d at 864.

The removal of these actions to this court is a mechanism for protecting this court's judgment and order. Under the circumstances, it is the preferred method of enforcement, since it affords greater comity to state courts and is less burdensome on the parties than an injunction or contempt citation would be.

B. *Motion to Dismiss*

The terms of the Settlement Agreement, incorporated in this court's order, bar plaintiffs from proceeding with this action. That these plaintiffs' injuries were not discovered until after the initial opt-out deadline of May 1, 1984 is irrelevant. The Settlement Agreement expressly included "persons who have not yet manifested injury." 597 F.Supp. at 865. The agreement was approved by this court, upheld by the Second Circuit, and left undisturbed by the Supreme Court. 618 F.Supp. at 624-25, *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988). Defendants' motion to dismiss is therefore granted with respect to all plaintiffs (other than the civilian plaintiffs).

Since the court has found that it has subject matter jurisdiction and has granted defendants' motion to dismiss, it need not decide defendants' motion to amend the notices of removal with regard to the plaintiffs who are class members. There has been, and continues to be, a court-ordered bar on suits by class members against the defendants; accordingly, the court also need not address defendants' motion for a permanent injunction.

V. EQUITY

[12] At the heart of these lawsuits is plaintiffs' belief that it is unfair to bind them to the settlement because the latency of their injuries prevented them from knowing definitively whether or not they were included in the class at the time of the first deadline for opting out of the *Agent Orange* class action. The law allows them to be so bound. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 638-639 (2d Cir.1988) (affirming reorganization plan that binds future claimants with no present injuries). They are in fact bound. 618 F.Supp. at 625, *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647. Nevertheless, plaintiffs' argument raises significant considerations of justice.

The courts and Congress have long recognized the utility of equity actions in which one party brings suit as the representative of a group of claimants. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1751, at 7 (2d ed. 1986). Such representative suits provide for, among other advantages, the filing of enforceable claims that would be economically infeasable for one party to pursue, the protection of all parties from inconsistent judgments, and the

efficient administration of justice. *Id.* § 1754, at 54. Class actions are particularly valuable in mass torts where the transactional costs and burdens of individual litigation are great. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. 710, 803-39 (E. & S.D.N.Y.1991); Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U.Ill.L.Rev. 269.

Nevertheless, a representative suit can work unfairness, particularly when the representation binds persons who only become aware that they are class members after settlement rather than persons who, at the time the action is brought and decided, can definitively determine whether they are in the class. One can imagine many genuine conflicts of interest between two such groups within a class action. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. at 771-73. For example, current litigants might be willing to achieve a settlement even if it leaves funds inadequate to compensate future victims. Alternatively, future claimants might, in retrospect, disagree with prior litigation strategy or find new evidence in support of their claims.

Although Federal Rule of Civil Procedure 23(a) and (b) sets out criteria designed to ensure that all class members are being properly represented, for Rule 23(b)(3) actions, the "best practicable notice" requirement of Rule 23(c) is intended to provide additional protection of "the interests of individuals in pursuing their own litigations." *See* Fed.R.Civ.P. 23(c)(2) *Advisory Committee's Note to 1966 Amendments*. Yet, a plaintiff with a latent injury may even have actual notice and still not receive this additional protection because he or she may not have reason to believe the injury will appear.

Courts are authorized to take steps to alleviate these problems in the interest of fairness. As in the Manville bankruptcy actions, courts can oversee the appointment of a guardian to represent the interests of future claimants in class action litigations and settlements. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. at 773. Such a guardian was not necessary in the *Agent Orange* Settlement because of the way it was structured to cover future claimants. All of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund.

In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

Even when it is proper and necessary for the courts to be solicitous of the interests of future claimants, the courts cannot ignore the interests of presently injured plaintiffs as well as defendants in achieving a settlement. Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability. Making settlement of Rule 23 suits too difficult will work harms upon

plaintiffs, defendants, the courts, and the general public.

No less than in 1978, when the first of the *Agent Orange* suits was brought, the predicament of the Vietnam veterans and their families is one that warrants national concern and action. The settlement of the *Agent Orange* litigation promised, and has provided, a partial remedy for many veterans' hardships. But the suffering of the veterans and their families, and the frustration and anger it causes, continues to argue for a more systematic and powerful cure. In 1984 this court urged that "the government join with plaintiffs and defendants in even greater efforts toward this noble goal." 597 F.Supp. at 862. Last year, an important step was taken by the Department of Veterans Affairs, which expanded care provided to Vietnam veterans by establishing an official "presumption" that, in certain circumstances, syndromes such as non-Hodgkin's lymphoma and chloracne resulted from service in Vietnam. 38 C.F.R. § 3.311a (1990). Congress has since codified and expanded this decision in a statute that also establishes a program for federally funded research into the connection between herbicide exposure and various diseases, to be conducted in conjunction with the National Academy of Sciences. *See Agent Orange Act of 1991*, Pub.L. No. 102-4, 105 Stat. 11 (1991). Present and future claimants alleging exposure to Agent Orange thus may be eligible to receive compensation from both the *Agent Orange* settlement and the Department of Veteran Affairs.

By their actions, Congress and the Department of Veteran Affairs have recognized that the Agent Orange controversy has become a political rather

than a judicial question. *See* 137 Cong. Rec. H719 *et seq.* (January 29, 1991) (statements of members of Congress in support of the Agent Orange Act). Except for overseeing the expenditure of the Settlement Fund to ensure that it does the greatest possible good for the veterans and their families, the court can do nothing more for the plaintiffs.

VI. CONCLUSION

Decision on the plaintiffs' motion for remand as it affects the two civilian plaintiffs, Charles Brown and Clarence White, is reserved for further consideration. The motion for remand is denied as to all other plaintiffs. They are members of the class previously certified in the *Agent Orange* litigation. The claims of (or on behalf of) Shirley Ivy, Donald Ivy, Charles Jardon, Toni K. Jardon, Charles Jardon Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Verda Wilson, Isaiah Wilson, Jr., Shirley Zalewaski, Yen Zalewaski, Gary Thomas, Mary Lee Thomas, James L. Kent, Emma I. Kent, Dawn Marie Inman, Bobby Joe Inman, Earl Thompson, Judy L. Thompson, James Donald Deloatch, Joyce Deloatch, Peggy Sands, Martin Sands, Emile Annibolli, Ursula Margot Parry, James D. Parry, Sr., James D. Parry, Jr., James Christopher Parry, Laura Jenkins, Eddie Jenkins, Ronald L. Hartman, Katherina H. Hartman, Jeffrey Alan Hartman, and Angela Hartman are dismissed.

No costs or disbursements are awarded. The court will not entertain a Rule 11 motion for sanctions. It has considered the issue and finds sanctions not warranted.

So ordered.

APPENDIX 1

Agent Orange Class Assistance Program
Grants Awarded Through September 30, 1991

Grants Active as of September 30, 1991	*State*	*Award*
American Association of University Affiliated Programs	NAT	$262,352
Aliviane/Inner Resource Recovery System	TX	$121,409
American GI Forum NVOP	TX	$250,553
American GI Forum NVOP	CA	$174,259
The American Legion	IL, IN, KS, KY, MI, MN, MO, NM, NY, PA, OK, OR, FL, NC, SD	$904,932
Association for Retarded Citizens/GA	GA	$169,889
ARCH Training Center Inc.	DC	$157,871
Bayaud Industries Inc.	CO	$64,880
Base Camp Inc.	TN	$129,271
Community and Family Services Inc.	IN	$152,637
Community Health Center, Inc.	OK	$155,934
COPIN Foundation	NY	$182,210
Community Outreach to Vietnam Era Returnees	VA, WV	$368,099
Easter Seal Society of Iowa Inc.	IA	$56,191
Albert Einstein College of Medicine	NY	$188,667

Family Service Association of Brown Co.	WI	$74,890
Family Service Assn. of Central Connecticut	CT	$75,422
Federation for Children with Special Needs	MA	$135,034
Family Services of Tidewater Inc.	VA	$154,832
Florida State University	FL, AL	$134,943
Kennedy Institute	MD	$231,270
Lower Eastside Service Center	NY	$239,522
Logan County Vietnam Veterans Inc.	WV	$88,358
Mountain Comprehensive Care Center/PLUS	KY	$139,549
McLean Hospital	MA	$169,900
Mental Health Law Project	NAT	$160,119
Montana Univ. Affiliated Rural Inst. on Disabilities	MT	$179,030
The Navajo Nation Department of Veterans Affairs	AZ	$171,938
National Handicapped Sports	NAT	$169,990
Center for Developmental Disabilities	SC	$772,627
American Red Cross	NM	$141,643
National Veterans Legal Services Project	NAT	$941,113
Occupational Center of Essex County	NJ	$74,759
Puerto Rico Vietnam Veterans Assistance Program	PR	$239,027
Paralyzed Veterans of America	NAT	$318,125
Philadelphia Vets. Multi-Service Center	PA	$205,493
Rehabilitation Enterprises of N.E. Wyoming	WY	$100,351

Saratoga County Rural Preservation Co.	NY	$77,615
Southern California Veteran Service Center	CA	$150,653
Suffolk County Youth Bureau	NY	$109,522
Department of Human Resources City of Seattle	WA	$152,608
Second Start Inc.	CA	$144,568
Shriver Center University Affiliated Program	MA, ME, NH, VT	$217,643
Skagit Community Mental Health Center	WA	$67,473
Southeast Oregon Rural Health Network (SORHN)	OR	$69,439
Spina Bifida Association of America	MD	$423,238
Swords to Plowshares	CA	$241,997
Team of Advocates for Special Kids	CA	$139,545
United Cerebral Palsy	NY	$62,780
United Cerebral Palsy Associations, Inc.	NAT	$291,423
Universal Family Connection, Inc.	IL	$158,219
University of Alaska	AK	$136,539
University of Mississippi UAP	MS	$174,518
University of North Carolina UAP	NC	$138,886
Utah State University	UT	$150,831
Veterans Assistance Center Inc.	CA	$174,215
Veterans Benefits Clearinghouse Inc.	MA	$176,921
Vets House, Inc.	WI	$109,235
VETS Inc.	MI	$143,714

Vietnam Era Veterans Assn. of Rhode Island	RI	$104,300
Veterans Outreach Center Inc.	MA	$81,700
Vietnam Veterans of Brevard Inc.	FL	$188,793
Vietnam Veterans of America Ohio State Council	OH	$126,921
Vietnam Veterans Agent Orange Victims Inc.	CT	$184,522
Vietnam Veterans of California Inc.	CA	$278,773
VVLP–St. Louis	MO	$121,268
VVLP–Arkansas	AR	$49,079
Vietnam Vets of San Diego	CA	$262,468
Community Service Programs of West Alabama	AL	$87,090
Wilderness Inquiry Inc.	MN	$62,013
Total Active Grant Awards		**$13,518,951**

Grants Expired or Terminated as of September 30, 1991

Alabama VVLP	AL	$140,000
American GI Forum NVOP	TX	$238,622
American Red Cross	NM	$102,176
American Red Cross	NM	$127,191
The American Legion	IL, IN, KS, KY, MI, MN, MO, NM, NY, PA, OK, OR	$699,621
ARCH Training Center Inc.	DC	$100,000
ARCH Training Center Inc.	DC	$154,910

Association for Retarded Citizens/GA	GA	$162,078
Base Camp Inc.	TN	$67,890
Bayaud Industries Inc.	CO	$60,664
Center for Developmental Disabilities	SC	$267,920
Center for Developmental Disabilities	SC	$388,505
Community Outreach to Vietnam Era Returnees	VA	$246,991
Community Outreach to Vietnam Era Returnees	VA	$331,164
COPIN Foundation	NY	$182,354
County of Santa Cruz	CA	$25,000
Department of Human Resources City of Seattle	WA	$149,813
Albert Einstein College of Medicine	NY	$115,903
Family Service Assn. of Central Connecticut	CT	$71,772
Family Service Association of Brown Co.	WI	$54,629
Family Service Association of Brown Co.	WI	$65,341
Family Services of Tidewater Inc.	VA	$132,330
Federation for Children with Special Needs	MA	$127,043
Federation for Children with Special Needs	MA	$50,324
Help-Aid-Direction Inc.	NY	$92,410
Kennedy Institute	MD	$217,208
Logan County Vietnam Veterans Inc.	WV	$52,480
McLean Hospital	MA	$152,034
Mental Health Law Project	NAT	$128,608

Mountain Comprehensive Care Center/PLUS	KY	$129,745
National Handicapped Sports	MD	$194,153
National Veterans Legal Services Project	DC	$50,000
National Veterans Legal Services Project	DC	$692,272
National Veterans Legal Services Project	DC	$883,777
Occupational Center of Essex County	NJ	$71,000
Occupational Center of Essex County	NJ	$74,759
Vietnam Veterans of America Ohio State Council	OH	$120,705
Paralyzed Veterans of America	DC	$95,200
Philadelphia Vets. Multi-Service Center	PA	$165,185
Saratoga County Rural Preservation Co.	NY	$44,591
Southern California Veteran Service Center	CA	$147,305
Spina Bifida Association of America	MD	$359,255
Swords to Plowshares	CA	$90,000
Swords to Plowshares	CA	$25,000
Team of Advocates for Special Kids	CA	$126,109
The American Legion	DC	$544,962
Touro College – Jacob D. Fuchsberg Law Center	NY	$16,333
United Cerebral Palsy	NY	$112,003
Utah State University	UT	$142,035
Veterans Assistance Center Inc.	CA	$25,000
Veterans Assistance Center Inc.	CA	$76,887

Veterans Benefits Clearinghouse Inc.	MA	$166,907
VETS Inc.	MI	$128,771
Vietnam Era Veterans Assn. of Rhode Island	RI	$82,816
Vietnam Veterans Agent Orange Victims	CT	$101,800
Vietnam Veterans of America Ohio State Council	OH	$77,000
Vietnam Veterans of Brevard Inc.	FL	$129,920
Vietnam Veterans of Brevard Inc.	FL	$205,174
Vietnam Veterans of California Inc.	CA	$249,950
Vietnam Vets of San Diego	CA	$249,968
VVLP–Arkansas	AR	$79,883
VVLP–Arkansas	AR	$106,602
VVLP–St. Louis	MO	$96,928
Woodlawn East Community and Neighbors	IL	$154,666
Total Expired or Terminated Grant Awards		**$10,397,375**
Total Assistance Program Grant Awards		**$23,916,326**

APPENDIX 2

AGENT ORANGE CLASS ASSISTANCE PROGRAM

SUMMARIES OF ACTIVE GRANTS
October 1, 1991

Albert Einstein College of Medicine
Bronx, New York

$186,667
October 1, 1991

Contact: Mary DiVivo
Telephone: (212) 430-2441

Provides services and assistance to address the needs of children of Vietnam veterans with developmental or other chronic disabilities and the needs of their families. Services include diagnostic assessments, adaptive equipment, rehabilitative therapy, case-management and counseling for both the children and families. Targeted service population is lower income Vietnam veteran families residing in the Bronx.

Aliviane/Inner Resource Recovery System
El Paso, Texas

$121,409
December 1, 1990

Contact: Juan Avila
Telephone: (915) 779-3764

Provides rehabilitative and supportive services for Vietnam veterans and their families in El Paso and surrounding West Texas area. Addresses the problems of drug and alcohol addiction and their related underlying causes such as post-traumatic stress disorder and provides support to family members affected by these issues. Also provides case-

management services in order to meet related needs, including the needs of disabled children.

American Association of University Affiliated Programs
Washington, D.C.

$262,352
May 1, 1991

Contact: Tino Zamora
Telephone: (301) 588-8252

National project to enlarge scope and quality of services provided to disabled children of Vietnam veterans and their families. AAUAP will provide training and technical assistance to AOCAP grantees, training and information on the needs of such veterans and families and on the veterans' benefits system to organizations serving developmentally disabled children, and foster collaboration among disabilities services organizations and AOCAP grantees serving Vietnam veterans.

American GI Forum NVOP
San Antonio, Texas

$250,553
February 1, 1991

Contact: Carlos Martinez
Telephone: (512) 223-4088

Enables Vietnam veterans and their families to benefit from greater access to social, medical and rehabilitative services. Project Staff provides case-management services to secure available public and other benefits and services, and provides adaptive equipment to disabled children of Vietnam veterans. Program is targeted toward Hispanic Vietnam veterans and their families living in or around the cities of Dallas and San Antonio, Texas.

American GI Forum NVOP
Los Angeles, CA

$174,259
October 1, 1991

Contact: Carlos Martinez
Telephone: (512) 223-4088

Enables Vietnam veterans and their families, particularly those families with needs relating to a child with a developmental or other disability, to benefit from greater access to and utilization of the system of social, medical and rehabilitative services to which they are entitled and for which they have a need. Targeted toward Hispanic Vietnam veterans and their families living in or around the city and county of Los Angeles, California.

American Red Cross
Albuquerque, New Mexico

$141,543
July 1, 1991

Contact: Joe Salas
Telephone: (505) 265-8514

Assists Vietnam veterans and their families with rent and food while the veteran is in the Albuquerque area to participate in a 7 week PTSD outpatient treatment program at the local VA Medical Center. Project includes case-management services to assist in obtaining related services from area agencies, especially for those families with a child with a developmental or other chronic disability.

ARCH Training Center Inc.
Washington, D.C.

$157,871
August 1, 1991

Contact: Ken Boggs
Telephone: (202) 610-2957

Serves homeless Vietnam veterans and their families through transitional housing, training, employment readiness services as well as counseling and social services case-managed referral. Clients are taken into the program through an extensive needs assessment and provision of emergency services. The program is supplemented by a matching grant from the local area public utility company and training and job readiness is provided at no cost to AOCAP.

Association for Retarded Citizens/GA
Atlanta, Georgia

$169,889
May 1, 1991

Contact: Pat Smith
Telephone: (404) 761-3150

Provides direct assistance and training for Vietnam veterans and their spouses who are parents of disabled children in accessing available benefits and services in the areas of health care, education and housing. Assistance is provided in obtaining free or low cost legal representation to resolve conflicts with federal and state agencies. The program is also developing a state-wide parent/peer support network for Vietnam veterans and their families with children with disabilities.

Base Camp Inc.
Nashville, Tennessee

$129,271
July 1, 1991

Contact: Jerry Washington
Telephone: (615) 320-5616

Provides counseling, advocacy and case-management services for Vietnam veterans and their families in the middle Tennessee area, especially those who have needs relating to a child with a disability. Addresses problems and needs such as family disruption due to post-traumatic stress disorder and substance abuse, homelessness, and inability to access services and benefits to which these families may be entitled. Special case-management services and advocacy for families with a

Bayaud Industries Inc.
Denver, Colorado

$64,880
June 1, 1991

Contact: Tom Amvotte
Telephone: (303) 777-5281

Enables Vietnam veterans, the children of Vietnam veterans, or family members with disabilities and/or medical conditions to lead more productive, integrated and independent lives. Provides rehabilitation services and employment to 25 such individuals with disabilities annually. Services include case-management, vocational evaluation, work adjustment training, job placement and employment training services as well as information and referral services for these clients and their family members.

Center for Developmental Disabilities
Columbia, South Carolina

$772,627
July 1, 1991

Contact: Dr. Bryan Smith
Telephone: (803) 777-4435

National program to provide Vietnam veterans and their families with access to assistance in providing for the needs of their developmentally disabled or chronically ill children and the needs of the families through a National Information System (NIS). The NIS provides toll free telephone access to trained human services counselors who counsel and advise individuals or other professionals who are assisting them in finding appropriate resources to address their needs through existing

College of Rural Alaska – University of Alaska
Fairbanks, Alaska

$136,539
October 1, 1991

Contact: Tima Priess
Telephone: (907) 456-4238

Expands the range and availability of services to Vietnam veterans and their families living in Interior Alaska and assists them in overcoming the cultural and geographic barriers to those services. Address family disruption associated with post-traumatic stress disorder and family stresses associated with having a child with a disability or other special needs. Operates through a service partnership with the VA Counseling Center (Vet Center) in Fairbanks and makes special efforts to

Community and Family Services Inc.
Portland, IN

$152,637
January 1, 1991

Contact: Larry Brade
Telephone: (219) 726-9318

Provides case-managed, coordinated community services for disabled children of Vietnam veterans

and their families. Provides medical assessments, counseling, special education, advocacy, parent training and respite services as well as limited therapeutic and medical assistance to enable Vietnam veterans and their families to receive the highest degree of comprehensive services available in order to address their specific needs.

Community Health Center, Inc.
Oklahoma City, OK

$155,934
January 1, 1991

Contact: Wayne C. Thompson
Telephone: (405) 427-8683

Assists disabled children of Vietnam veterans and their families through the provision of services that are either not currently available or to which these children and families do not now have access. Includes intensive identification and recruitment and development of specific plans for meeting the individual and family needs of participants. Collaborative effort with other area agencies and organizations including the developmental disability community and veteran service organizations in the

Community Outreach to Vietnam Era Returnees
Charlottesville, Virginia

$368,099
July 1, 1991

Contact: Mary James
Telephone: (804) 971-8449

Provides multi-service program for Vietnam veterans and their families throughout large parts of the region known as Appalachia. Includes extensive efforts to reach rural Vietnam veterans and their families and provides counseling and case-manage-

ment assistance to enable those veterans and their family members to access and utilize public services which may be available to address their needs. Provides "bridge" services to Vietnam veteran families with children with developmental

Community Service Programs of West Alabama
Tuscaloosa, AL

$87,090
February 1, 1991
Contact: Helen San Tucker
Telephone: (205) 758-4756

Addresses the needs of Vietnam veterans and their families in six western Alabama counties. Provides direct counseling and support services to Vietnam veterans and their families with particular attention to the needs of children with physical and developmental disabilities. Provides intensive outreach in rural portions of the area, with emphasis on services to disadvantaged and minority Vietnam veterans and their families. Special efforts are made to enroll pre-school children

COPIN Foundation
Niagara Falls, New York

$182,210
June 1, 1991
Contact: Sharon McGrath
Telephone: (716) 283-5622

Provides case-managed and direct services for Vietnam veterans and their families including diagnostic assessments for children with developmental disabilities, health assessments and medical services for other family members and family and substance abuse counseling for Vietnam veterans and their family members. Also provides emergency support

services for homeless Vietnam veterans and their families such as food and clothing.

Department of Human Resources City of Seattle
Seattle, Washington

$152,608
July 1, 1991

Contact: Harold D. Whitehead
Telephone: (206) 684-4708

Provides outreach, counseling, advocacy, and supportive services to Vietnam veterans and their families, especially those with children with developmental or other disabilities in both the urban and rural areas of King County, Washington. Services include direct and referral services for Vietnam veterans and their children who have developmental, behavioral or other chronic disabilities. Special efforts are made to serve economically disadvantaged, minority, homeless and rural

Easter Seal Society of Iowa Inc.
Des Moines, Iowa

$56,191
November 1, 1990

Contact: Brian Wines
Telephone: (515) 289-1933

Assists Vietnam veterans' children with disabilities to become as independent as possible and learn to interact successfully in society and to assist their families in meeting a range of related needs. Provides direct services to children to meet their needs for independent living skills and social recreation, and by providing family support services to meet their parents' needs for information, resources, respite care, education and emotional support.

Family Service Assn. of Central Connecticut
Meriden, Connecticut

$75,422 Contact: Jim Gavin
November 1, 1990 Telephone: (203) 235-7923

Provides services to Vietnam veterans and their families to enable them to become more fully integrated and benefit from greater access and utilization of the public system of social, medical and rehabilitative services. Provides direct assistance to Vietnam veterans and their families, particularly those with disabled children in the form of assessments, family counseling, case-managed referrals and adaptive equipment necessary in meeting the needs of the child.

Family Service Association of Brown Co.
Green Bay, Wisconsin

$74,890 Contact: Mary Jo Kane
July 1, 1991 Telephone: (414) 499-8768

Provides group and individual counseling for Vietnam veterans and their families in Green Bay and surrounding northern Wisconsin area. Services include group and individual counseling for spouses of Vietnam veterans, children of Vietnam veterans as well as group and individual counseling for Vietnam veteran families. Therapy for Vietnam veterans and their families who are experiencing problems related to chemical abuse is provided along with family crisis counseling.

Family Services of Tidewater Inc.
Norfolk, Virginia

$154,832
October 1, 1991

Contact: Edward F. McCann
Telephone: (804) 622-7017

Serves Vietnam veterans, their families, especially those with children with disabilities, who live in the Greater Hampton Roads Area of Southeastern Virginia. Provides children and families with direct assistance in accessing available community resources and in effecting changes and enhancements within the existing service delivery system. Also provides informational and training workshops for the parents as well as in-house ancillary services.

Federation for Children With Special Needs
Boston, Massachusetts

$135,034
July 1, 1991

Contact: Deborah Crane
Telephone: (617) 482-2915

Assists families of Vietnam veterans with developmentally disabled children throughout the state of Massachusetts. Enables Vietnam veterans and their families to cope more effectively with the problems of raising a disabled child by conducting information and rights workshops and furnishing technical assistance in forming a parent network. Also provides individual case-management assistance for families in coordination with the parent counseling program at McLean

Florida State University
Tallahassee, Florida

$134,943
April 1, 1991

Contact: Dr. Charles R. Figley
Telephone: (904) 644-1588

Provides psychosocial services to Vietnam veterans, their families and children residing in northern Florida and southern Georgia and Alabama. Provides developmental and diagnostic assessments for children of Vietnam veterans, marriage, spouse and family counseling, in-residence consultations and the development and implementation of a family empowerment program. Particular emphasis in the project is placed on the needs of Vietnam veterans' children with disabilities.

Kennedy Institute
Baltimore, Maryland

$231,270
August 1, 1991

Contact: Paula Scher/Interim
Telephone: (301) 550-9700

Enables Vietnam veterans' children with developmental disabilities and their families to lead independent, productive, integrated lives. Provides individualized family support services to families and children with birth defects or disabilities, including case-management, home-based consumer and parent-based training and counseling. Includes efforts to integrate 30 families into existing service delivery system in Maryland, and to break down barriers to services for veterans

Logan County Vietnam Veterans Inc.
Mt. Gay, West Virginia

$88,358
April 1, 1991

Contact: Mildred Hughes
Telephone: (304) 752-6555

Provides health, legal advocacy and social services to Vietnam veterans and their families in a seven county area of rural Southwestern West Virginia. Services include public information and education, direct and referral services for Department of Veterans Affairs and other public benefits and counseling. Pro-bono and discounted medical services, adaptive and rehabilitative equipment and transportation to service delivery sites are also provided for Vietnam veterans and their

Lower Eastside Service Center
New York, New York

$239,522
April 1, 1990

Contact: Eileen Pencer
Telephone: (212) 233-5372

Has established a Vietnam Veterans and Family Services Center to address the service needs of Vietnam veterans and families whose lives have been affected by post-traumatic stress disorder, substance abuse or other dysfunctional behaviors. Provides case-management services, counseling, benefits assistance, resource and referral assistance and advocacy services to approximately 40 Vietnam veteran families. Provides developmental screening, evaluation and follow-up for 50

McLean Hospital
Belmont, Massachusetts

$169,900
April 1, 1991

Contact: Dr. Charles Levy
Telephone: (617) 484-0140

Assists, on a case-managed basis, Vietnam veterans with developmentally disabled children, in

coping with the anger, fear and guilt associated with both Vietnam and parenting experiences. Provides testing and therapy to veterans in the greater Boston area, and linkages to other services to assist their developmentally disabled children in the areas of self advocacy, parent peer support and education. Enables veterans and families to cope more effectively with problems of raising a

Mental Health Law Project
Washington, D.C.

$160,119 Contact: Leonard Rubenstein
September 1, 1991 Telephone: (202) 467-5730

National program to enable Vietnam veterans and their families with children with developmental disabilities to have better access to and utilization of income support, health benefits and educational services under the Social Security and special education systems. Provides informational resources and consultation to veterans and families as well as other advocacy organizations so that low-income veteran families with children with disabilities have assistance in applying for benefits under

Mississippi University Affiliated Program
Hattiesburg, Mississippi

$174,578 Contact: Dr. Jane Siders
October 1, 1991 Telephone: (601) 266-5163

Facilitates access to health and human services for Vietnam veterans and their families with children with disabilities living in and around the cities of Hattiesburg, Jackson and Biloxi, Mississippi. Provides

a range of services including case-management, advocacy, assessments of disabilities and other related needs. Operates through a service partnership with VA Counseling Centers (Vet Centers) in Jackson and Biloxi and will undertake special efforts to reach and provide services to rural

Montana Univ Affiliated Rural Inst. on Disabilities
Missoula, Montana

$179,030
September 1, 1990

Contact: Gordon Hollingshead
Telephone: (406) 243-4131

Provides services and assistance to Vietnam veterans' children with disabilities and their families in western Montana, which they have been unable either to find or pay for and develops individualized service delivery plans for meeting each family's needs. Provides children and families with funding for services, adaptive equipment, special materials and diets, respite care, counseling, chore services. Also provides case-management assistance, parent support and advocacy training.

Mountain Comprehensive Care Center/PLUS
Paintsville, Kentucky

$139,549
August 1, 1991

Contact: John A. Cook
Telephone: (606) 789-7587

Delivers direct and referral services to Vietnam veterans and their families residing within the Big Sandy Region of Eastern Kentucky. Emphasis is placed on providing services to children of Vietnam veterans who have developmental disabilities, to include screening, diagnostic assessments, parent

training, transportation assistance, pre-school and nursery services, and crisis respite care. Also conducting an outreach educational effort throughout the counties surrounding the Big Sandy

National Handicapped Sports
Bethesda, Maryland

$130,500	Contact:	Jim McConkey
May 1, 1991	Telephone:	(301) 652-7505

National program to locate disabled children of Vietnam veterans, disabled Vietnam veterans and family members and to introduce and involve these individuals in sports and recreation programs. Primary focus of the program is to provide services to disabled children of Vietnam veterans. Serves persons with physical disabilities, such as spinal cord injury, visual impairment, cerebral palsy, neuromuscular disorders and other impairments resulting from birth defects or diseases such as

National Veterans Legal Services Project
Washington, D.C.

$941,113	Contact:	David Addlestone
July 1, 1991	Telephone:	(202) 265-8305

National program to address the legal services needs of Vietnam veterans and their families through training and consultation with veterans' advocates and individual and class representation of veterans and family members in the new Court of Veterans Appeals and the VA administrative process. Endeavors to educate, train and upgrade skills of

attorneys, service personnel and veterans' advocates providing services to Vietnam veterans

Occupational Center of Essex County
Orange, New Jersey

$81,507
October 1, 1991
Contact: Marylou Dodge
Telephone: (201) 672-5800

Provides case-managed referral and follow-up services for Vietnam veterans and their families in northern New Jersey counties who have needs relating to a child with a developmental or other chronic disability. Counseling services and advocacy are provided to the families of children with disabilities. Emphasis is given in advocacy work in dealing with public educational systems and development of Individual Educational Plans on behalf of children with learning disabilities.

Ohio State Council, Vietnam Veterans of America
Columbus, Ohio

$126,921
August 1, 1991
Contact: David Bradley
Telephone: (614) 228-0188

Assists homeless Vietnam veterans and their families through transitional housing, support services, and social services information and referral. Conducts regular outreach visits to homeless shelters in the Columbus area and elsewhere and also provides assistance to incarcerated Vietnam veterans and their families. Conducting a special rural outreach effort and will offer particular assistance to Vietnam veterans' children with developmental or other chronic disabilities.

Paralyzed Veterans of America
Washington, D.C.

$318,125 Contact: Andrew Fleming
October 1, 1990 Telephone: (202) 872-1300

Provides Outward Bound participation for Vietnam veterans suffering from Post Traumatic Stress Disorder as well as Vietnam veterans with severe physical disabilities, women Vietnam veterans, wives of disabled Vietnam veterans and disabled children of Vietnam veterans. Program is conducted through four Outward Bound schools in Portland, Oregon; Morganton, North Carolina; Hurricane Island, Maine; and Minnetonka, Minnesota.

Philadelphia Vets. Multi-Service Center
Philadelphia, Pennsylvania

$205,493 Contact: Edward J. Lowry
November 1, 1990 Telephone: (215) 546-9500

Serves Vietnam veterans and their families, particularly those with children with disabilities, who have needs such as psychological counseling, health services, veterans benefits and VA claims services. Addresses needs through case-managed referral and direct services in the areas of VA claims development and applying for other public programs. Also provides adaptive and rehabilitative equipment for veterans' children and transportation to VA medical facilities for veterans.

Puerto Rico Vietnam Veterans Assistance Program
Puerto Rico

$239,027 Contact: William Ramirez
July 1, 1991 Telephone: (809) 756-5480

Provides VA claims preparation as a follow-up to a recently settled class action lawsuit which provided new opportunities to regain VA compensation for Vietnam veterans residing in Puerto Rico who are suffering from post-traumatic stress disorder. Also provides case-management services for Vietnam veterans' families to enhance service availability for a range of related needs, with a special emphasis on serving the needs of disabled children of Vietnam veterans and their families.

Rehabilitation Enterprises of N.E. Wyoming
Sheridan, Wyoming

$100,351 Contact: Carmen Rideout
July 1, 1991 Telephone: (307) 672-7481

Serves Vietnam veterans' children with developmental or other disabilities in Wyoming and southeastern Montana to obtain medical, educational, rehabilitative, and other services to improve the quality of life; increase self-sufficiency, self-reliance, productivity and self-advocacy; and to promote community integration. Services include assessment and diagnostic services, individualized family service plans, case-management services and equipment or services which

Saratoga County Rural Preservation Co.
Saratoga, New York

$77,615 Contact: Dottie O'Donnell

May 1, 1991 Telephone: (518) 587-3477

Provides Vietnam veterans, their families and children with direct assistance in obtaining permanent housing, health care, counseling for substance abuse and post-traumatic stress disorder, as well as the essentials necessary to maintain a quality life in a self-care setting. Serves individuals and families through both case-management and direct assistance with particular emphasis on assistance to veterans' children with disabilities who reside in rural areas of northern New York.

Second Start Inc.
San Jose, California

$144,568 Contact: Betty Siemer
July 1, 1991 Telephone: (408) 371-5881

Provides a range of academic, therapeutic, case management, and pre-employment services to Vietnam veterans and families with children with developmental or learning disabilities. Conduct workshops for veterans and spouses to provide information regarding assessment and treatment strategies for developmental or learning problems. Services include assessments, remediation, academic and emotional support and pre-vocational training.

Shriver Center University Affiliated Program
Waltham, Massachusetts

$255,648 Contact: Dr. Karen E. Gould, Ph.D.
October 1, 1991 Telephone: (617) 642-0238

A multi-faceted program to improve the quantity and quality of services available to developmentally disabled children of Vietnam veterans and to their families living in Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island. Services include comprehensive evaluations, information and referral assistance, case coordination and follow-up services, comprehensive family support mechanisms, and technical assistance to other service providers.

Skagit Community Mental Health Center
Skagit, Washington

$63,473 Contact: Jere G. LaFollette
November 1, 1990 Telephone: (206) 336-3193

Provides comprehensive case-management and counseling services to disabled children of Vietnam veterans residing in Skagit, Island, or San Juan Counties of northwest Washington State. Works to identify disabled children, and seeks to ensure that the full range of resources and services are made available in the provision of treatment and rehabilitation services. Short-term family therapy and emotional support will be provided to the families of these children.

Southeast Oregon Rural Health Network (SORHN)
Chiloquin, Oregon

$69,439 Contact: Eddie L. Grady
January 1, 1991 Telephone: (503) 783-2171

Operates a nationwide electronic messaging network linking disabled young persons whose parents

are Vietnam veterans for purposes of enhancing communications abilities and computer skills, enabling them to share life experiences and strategies for coping with their circumstances, and developing a peer support network of such young people. A core group is being trained in electronic messaging, and will function as recruiters and resource development personnel to ensure the ongoing operation

Southern California Veteran Service Center
Los Angeles, California

$150,653
October 1, 1990

Contact: Arlene L. Williams
Telephone: (213) 671-8749

Enables disabled children of Vietnam veterans and their families to benefit from greater access and utilization of the public system of social, medical and rehabilitative services to which they are entitled. Provides direct assistance in the form of assessments, counseling and prosthetic devices and adaptive equipment such as eyeglasses, hearing aids, canes and wheelchairs or prosthetics. Physical and psychological diagnostic assessments are provided and families are provided

Spina Bifida Association of America
Silver Springs, Maryland

$423,238
January 1, 1991

Contact: Susan Leiboid
Telephone: (301) 770-7222

National program to enable children of Vietnam veterans with severe disabilities and the families of those children to pursue more fully integrated, productive and independent lives. Provides direct

assistance to children and/or their families in the form of assessments, case-management, independent living skills training, training in continence management, home accessibility assistance and provision of rehabilitative and adaptive equipment.

Suffolk County Youth Bureau
Hauppauge, New York

$109,522
October 1, 1991

Contact: Linda Devin-Sheehan
Telephone: (516) 348-5350

Provides support and direct services for children of Vietnam veterans in Suffolk County, Long Island, New York, including respite care, data-based information dissemination, child advocacy and training for educators and health care professionals. Conducted with the cooperation of the Suffolk County-wide system of health care and will focus on children with developmental and physical disabilities and those considered "youth-at-risk."

Swords to Plowshares
San Francisco, California

$241,997
April 1, 1990

Contact: David Ewing, Esq.
Telephone: (415) 552-8804

Provides representation and advocacy for Vietnam veterans and their families in their attempts to access veterans benefits through the U.S. Department of Veterans Affairs and to provide consultation and support to other veterans advocates assisting veterans and their families in these processes. Serves primarily disadvantaged Vietnam veterans and their families and places particular

emphasis on cases of appeals to the newly formed U.S. Court of Veterans Appeals.

Team of Advocates for Special Kids
Anaheim, California

$139,545
November 1, 1990
Contact: Lane Cole
Telephone: (714) 533-8275

Serves Vietnam veteran families who have children with special needs by teaching parents how to meet their child's special education requirements. Provides information to parents on the nature and needs of their child's disability and gathers referrals specifically geared toward the needs of individual families. Trains parents to participate in educational decision-making processes and provides one on one assistance at individualized Education Plan meetings.

The American Legion
Indianapolis, Indiana

$904,932
October 1, 1991
Contact: Max Tenberg
Telephone: (202) 861-2759

Provides service referral with supporting information and self-help training to assist Vietnam veterans and their families in obtaining family counseling services and services for children with birth defects and other disabilities. Identifies existing programs and links the veteran and family to such services through their network. Currently operates in Kansas, Kentucky, New York, Pennsylvania, Illinois, Indiana, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, and Oregon.

The Navajo Nation Department of Veterans Affairs
Window Rock, Arizona

$171,938 Contact: Leo Chischilly
January 1, 1991 Telephone: (602) 871-6352

Assists Vietnam veterans' children with developmental disabilities and/or serious, chronic health conditions obtain the medical, education, rehabilitation, social and other services to improve the quality of their lives; increase their self-sufficiency, independence and productivity; and promote integration into their communities. Provides comprehensive assessment and diagnostic services, individual family service plans, case management services, and funding for services which are not

United Cerebral Palsy
Canton, New York

$112,003 Contact: Lorraine Laurin
September 1, 1991 Telephone: (315) 386-8191

Provides comprehensive family support services for Vietnam veterans and their families having a child with a chronic disability in the counties of St. Lawrence, Franklin, Clinton and Essex, New York. Program is designed to remediate the lack of service accessibility for Vietnam veterans and their families. The program is home-based and provides direct case-managed services to include diagnostic evaluations, treatment and goal planning for a child's on-going life long continuum of care.

United Cerebral Palsy Associations, Inc.
Washington, D.C.

$291,423 — Contact: Bonnie Wooten Webb
October 1, 1991 — Telephone: (202) 842-1266

Operates a nationwide advocacy and peer support system for Vietnam veterans' children with disabilities to enhance interaction with peers, family members and the community through increased utilization and funding of assistive technology. Such technology includes adapted toys, computers, seating systems, powered mobility, communication devices, special switches and other available or adapted solutions. Developing assistive technology peer support resource center, a

Universal Family Connection, Inc.
Chicago, Illinois

$158,219 — Contact: Raymond Swope
March 1, 1991 — Telephone: (312) 445-0448

Provides a range of services to Vietnam veterans and their families in the Chicago area with priority given to families who have children with developmental, physical or behavioral disabilities. Provides such services as family counseling, respite care, transportation, education & vocational assessment, employment counseling & placement, homemaker services, home health care, legal advocacy, diagnosis and assessment, peer support, information and referral, recreational services and

University of North Carolina – Chapel Hill
Chapel Hill, North Carolina

$138,886 — Contact: Dr. Thomas Wasileski

October 1, 1991 Telephone: (919) 966-5171

Provides comprehensive services to developmentally disabled and educationally-at-risk children and families of Vietnam veterans throughout North Carolina. Offers a variety of services including in-depth evaluations of eligible children and their families, the development of Specialized Family Service Plans, and training for professionals. It will further help other service providers and professionals identify and meet the special needs of Vietnam veterans and their families.

Utah State University
Logan, Utah

$150,831 Contact: Vonda Lauritzen
December 1, 1990 Telephone: (801) 750-2001

Serves Vietnam veterans and their families living in remote or rural areas or the Navajo reservation, who have a child with a birth defect or developmental disability. Enables these families to benefit from greater access to systems of social, medical and rehabilitative services, enables their children to be mainstreamed into local programs, and enables those families to gain more knowledge about the child's condition and become successful advocates for their children.

Veterans Assistance Center Inc.
Berkeley, California

$174,215 Contact: Lou Bates
January 1, 1991 Telephone: (415) 849-2144

Provides residential assistance and supportive services for Vietnam veterans and their families in Alameda, Santa Clara and Contra Costa counties of California. Addresses the problem of homelessness among minority veterans, their spouses and the special needs of their children in the East Bay area, and provides the necessary skills to maintain independent living and enables the veteran and/or family member to become a productive member of society and the local community.

Veterans Benefits Clearinghouse Inc.
Roxbury, Massachusetts

$176,921	Contact:	Ralph Cooper
June 1, 1991	Telephone:	(617) 445-7030

Provides Vietnam veterans and their families with counseling, housing and other services in order to address a broad spectrum of problems faced by that population. Establishing a network of public and private agencies responsive to the specific needs of Black, Latino and other Vietnam veterans and families residing in the Greater Metropolitan Boston area. Establishing a mechanism in the state to identify and provide services for minority Vietnam veterans with special needs children.

Veterans Outreach Center Inc.
Pittsfield, Massachusetts

$81,700	Contact:	Daniel Denault
November 1, 1990	Telephone:	(413) 499-0256

Provides mobile services to Vietnam Veterans and their families to enable individuals to access

available services and benefits. Provides case-management, referral and transportation services to veterans and their families to enable them to gain access to other programs of services and benefits available to them throughout the service area of Massachusetts, as well as in adjacent areas of Connecticut, New Hampshire, and New York.

Vets House, Inc.
Madison, Wisconsin

$109,235	Contact:	Donna Vieth
October 1, 1990	Telephone:	(608) 255-1972

Provides services to improve the coping mechanisms and services availability for disabled children of Vietnam veterans and their families in the greater Madison Wisconsin area. Provides informational and case-managed referral services as well as counseling and other direct services and assistance to address the needs of children of veterans with developmental or other chronic disabilities as well as the needs of their families. A primary focus of the project will be children with learning

VETS Inc.
Muskegon, Michigan

$143,714	Contact:	Dennis Cobler
August 1, 1991	Telephone:	(616) 728-6385

Assists disadvantaged Vietnam veterans and families throughout Michigan, particularly those with needs relating to a child with a developmental or other disability, in securing appropriate benefits and services. Operates from six sites in the state of

Michigan with services targeted to veterans and their families living in rural areas. Provides case-management services, assistance in benefits applications and adaptive and rehabilitative equipment for children with disabilities.

Vietnam Era Veterans Assn. of Rhode Island
Providence, Rhode Island

$104,300 Contact: Joseph DeResta
January 1, 1991 Telephone: (401) 521-6710

Assists Vietnam veterans and their families in Rhode Island and Massachusetts, particularly those with needs relating to children with developmental or other disabilities, in meeting their needs for health care and other social services. Provides direct, case-managed assistance to veterans and their families in order to enable them to achieve an optimum level of success and productivity. Establishing a parent resource network, linking veteran families with developmentally disabled children.

Vietnam Veterans Agent Orange Victims Inc.
Darien, Connecticut

$184,522 Contact: Phil Kraft
January 1, 1991 Telephone: (203) 656-0003

Provides case-managed limited medical assistance to Vietnam veterans' children with developmental or other disabilities on a nationwide basis. Conducted in conjunction with the Brandie Schieb Children's Fund and provides limited economic assistance/relief to families of Vietnam veterans who have exhausted all other resources in their efforts to

provide quality medical care for their children with repairable and/or treatable developmental disabilities.

Vietnam Veterans of Brevard Inc.
Melbourne, Florida

$205,174 Contact: Joe Clark
September 1, 1991 Telephone: (407) 255-7411

Provides emergency and transitional services including housing, transportation and food, to Vietnam veterans and their families in the northern Florida area who are experiencing life crises which may be related to the experiences of the veteran family member during the Vietnam war. Provides such veterans and their families with counseling and case-managed referral services in order that they may acquire the skills and stability to lead more self-directed and productive lives.

Vietnam Veterans of California Inc.
Santa Rosa, California

$278,773 Contact: Peter T. Cameron
December 1, 1990 Telephone: (707) 578-8387

Provide health and social services to Vietnam veterans and families, particularly those having children with developmental or other disabilities, residing in Northern California. Services include direct and referral services for children with physical, developmental and behavioral disabilities, counseling for veteran family members, substance abuse services, as well as legal and financial counseling.

Provides adaptive and rehabilitative equipment for children through private sector

Vietnam Vets of San Diego
San Diego, California

$262,468 Contact: Dr. Marc Gotbaum
February 1, 1991 Telephone: (619) 295-8561

Provides direct and case-managed referral services for Vietnam veterans and their families, particularly those with a child with a developmental or other disability residing in a wide area surrounding San Diego. Services include diagnostic assessments for children, counseling for veterans and families, and shelter assistance for indigent veterans and family members. Counseling provided to families of children with disabling conditions with particular attention given to the needs

VVLP – Arkansas
Pine Bluff, Arkansas

$106,602 Contact: John Eeckhoudt
September 1, 1990 Telephone: (501) 534-3100

Assists disadvantaged Vietnam veterans and families in the Pine Bluff and Greater Little Rock areas of Arkansas. Emphasis is placed on helping veterans and families gain self-sufficiency and meet other critical needs, including housing, medical care, and employment. Provides assistance to children of veterans who have special health care needs in facilitating their referral to appropriate community resources in order to address their needs and the needs of their families.

VVLP – Arkansas
Pine Bluff, Arkansas

$49,079 Contact: John Eeckhoudt
October 1, 1991 Telephone: (501) 534-3100

Assists disadvantaged Vietnam veterans and families in the Pine Bluff and Greater Little Rock areas of Arkansas. Emphasis is placed on helping veterans and families gain self-sufficiency and meet other critical needs, including housing, medical care, and employment. Provides assistance to children of veterans who have special health care needs in facilitating their referral to appropriate community resources in order to address their needs and the needs of their families.

VVLP – St. Louis
St. Louis, Missouri

$129,392 Contact: William D. Elmore
October 1, 1991 Telephone: (314) 367-5505

Provides counseling and transitional housing for homeless Vietnam veterans and families in the greater St. Louis area. Serves veterans and their families who are experiencing problems relating to the veteran's post-traumatic stress disorder, alcohol or substance abuse. Provides transitional housing, meals and other basic resources to veterans and families, as well as assistance in securing productive employment. Assistance provided to veteran families with a child with developmental

Wilderness Inquiry Inc.

Minneapolis, Minnesota

$62,013	Contact:	Susan Fishman
October 1, 1990	Telephone:	(612) 379-3858

Provides a range of outdoor activities designed to socially integrate children of Vietnam veterans and families in experiences that inspire personal growth, enhance community integration, develop peer relationships, develop independent living skills and build self-esteem. Activities include dog-sledding, canoeing, camping and range from one day to a week in length. Provided primarily to disabled children of veterans, but will include non-disabled youth and family

APPENDIX 3

Agent Orange Class Assistance Program
Participants Through 6–30–91

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
AAUAP	MD	2	0	0	0	New
Aliviane	TX	7	88	5	36	129
American GI Forum	TX	21	281	173	134	588
American Legion	NAT	24	4341	746	2109	7196
American Red Cross	NM	24	128	140	337	605
ARCH	DC	24	62	12	34	108
Association for Retarded Children	GA	17	135	172	248	555
Basecamp	TN	14	47	49	54	150
Bayaud Industries	CO	16	33	1	1	35
Community Health Centers	OK	6	25	88	47	160
Chicago-Universal Family Connection	IL	4	38	40	82	160

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
Community and Family Services, Inc.	IN	6	32	41	30	103
COPIN	NY	13	1147	197	187	1531
COVER	VA	24	934	458	207	1599
Easter Seals IA	IA	8	17	1	7	25
Einstein	NY	9	6	15	48	69
Family Services of Brown County	WI	24	124	81	76	281
Family Services of Conn	CT	9	47	0	54	101
Federation for Children w/ Spec Needs	MA	27	71	136	171	378
Florida State University	FL	3	7	8	6	21
Kennedy Institute	MD	12	30	41	51	122
Logan Vietnam Veterans	WV	15	243	0	149	392
Lower Eastside Service Center	NY	15	42	55	67	164
McLean Hospital (Harvard)	MA	15	309	249	181	739

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
Mental Health Law Project	NAT	11	17	15	0	32
Montana UAP	MT	10	47	14	55	116
Mountain Care	KY	11	153	58	79	290
Nat Vets Legal Services Project	NAT	33	5048	2699	132	7879
National Handicapped Sports	NAT	27	86	126	148	360
National Information System, USC	NAT	24	892	20	3631	4543
Navajo Dept of Vets Affairs	AZ	6	25	0	20	45
Occupational Center	NJ	21	23	35	59	117
Paralyzed Veterans of America	NAT	25	133	0	3	136
Philadelphia Vets Multi-Service Ctr	PA	20	673	40	54	767

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
Puerto Rico Veterans Program	PR	0	0	0	0	NEW
RENEW	WY	0	0	0	0	NEW
Saratoga Rural Preservation	NY	15	240	29	35	304
SE Oregon Rural Health Network	OR	6	1	5	8	14
SEAVAC	WA	14	258	30	53	341
Second Start	CA	0	0	0	0	NEW
Shriver Ctr	MA	9	18	23	141	182
Skagit	WA	8	13	29	26	68
So. Calif Vets Services Council	CA	21	461	239	181	881
Spina Bifida Association of America	NAT	20	0	0	294	294
St. Louis VVLP	MO	21	394	28	192	614
Suffolk County Youth Bureau	NY	9	80	52	46	178
Swords to Plowshares	CA	27	1296	26	18	1340

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
Team of Advocates for Special Kids	CA	27	0	0	403	403
Tidewater Family Services	VA	9	34	30	57	121
United Cerebral Palsy of Canton	NY	9	20	27	16	63
Utah State University	UT	19	125	130	68	323
Veterans Assistance Center, Berkeley	CA	24	290	27	84	401
Veterans Benefits Clearinghouse	MA	14	182	35	120	337
Vets House	WI	9	209	20	12	241
VETS Inc	MI	18	118	114	383	615
Vietnam Era Veterans Association, RI	RI	19	337	245	285	867
Vietnam Veterans Agent Orange Victims	NAT	22	1016	432	413	1861
Vietnam Veterans of America, Ohio	OH	23	512	83	156	751

Grantee	State	Months in Operation	Vets Served	Other Fam Mem Svd	Children Served	Total Served
Vietnam Veterans of Brevard	FL	22	3929	96	11	4036
Vietnam Veterans of California	CA	19	152	47	387	586
Vietnam Veterans of San Diego	CA	17	212	135	182	529
VVLP Arkansas	AR	22	417	201	384	1002
Western Alabama	AL	6	40	16	13	69
Western Mass Vets Outreach	MA	10	314	42	19	375
Wilderness Inquiry	MN	9	21	14	67	102
TOTALS			25638	7814	12465	45917

Source for all appendices: *Third Annual Report of the Agent Orange Class Assistance Program* (Oct. 3, 1991)

APPENDIX H

SECTIONS 1292(b), 1447(c) AND 1447(d) OF TITLE 28 OF THE THE UNITED STATES CODE

Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 1447(c) provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An

order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Section 1447(d) provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Supreme Court, U.S.
FILED
NOV 6 1992
OFFICE OF THE CLERK

(2)

No. 92-438

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

THE DOW CHEMICAL COMPANY, *et al.*,
Petitioner,

v.

CHARLES BROWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES BROWN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. HAGER
2020 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 331-9831

Counsel of Record

November 7, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

If the writ of certiorari were granted, Respondents would add the following questions to those presented by the Petition, as alternative grounds for upholding the Court of Appeals' denial of review:

I) Whether the Court of Appeals was justified in denying a discretionary appeal that would rely upon an amendment to Petitioners' Notice of Removal that was improper under 28 U.S.C. § 1653, as a clearly out of time amendment of substance;

II) Whether the district court erred in holding that a corporation may remove under § 1442;

III) Whether the district court erred in removing claims of veterans' in Ryan, the case to which the civilians were supposedly "pendent" parties;

The Petition also inherently raises the following question as to award of attorney fees:

IV) Whether attorney fees should be awarded against Petitioners under 28 U.S.C. § 1446(a) and F.R.Civ.P., Rule 11, under § 1447(c), and as "terms" under § 1653, where Petitioners have 1) defended a frivolous § 1441 Notice of Removal for 18 months, before filing a late amendment to that Notice introducing entirely new grounds for removal under § 1442; 2) made multiple attempts to appeal a non-appealable order that rejected all grounds Petitioners alleged to support federal jurisdiction; and 3) sought a writ of certiorari to review the non-reviewable discretionary denial by the Court of Appeals of a 28 U.S.C. § 1292(b) appeal of a § 1447(c) remand order that itself, under all existing authority, is "not reviewable on appeal or otherwise." § 1447(d).

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II. THERE IS NO CONFLICT WITH ANY CIRCUIT ON THE SUPPOSED NEED TO RECONCILE 28 U.S.C. § 1447(d) AND 28 U.S.C. § 1292(b), AND PETITIONERS' RECOMMENDED RESOLUTION OF THE ALLEGED CONFLICT -- A PREVENTION OF DELAY TEST -- WOULD NOT REQUIRE REVERSAL OF THE RULING BELOW . . 29

III. ANY CONFLICT AMONG THE CIRCUITS AS TO THE PROPER "AVENUE" FOR REVIEW OF REMAND ORDERS IS IRRELEVANT TO THIS CASE 40

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STATEMENT OF THE CASE

In 1989, Texas citizens and others filed tort claims in Texas state court pleaded exclusively under state law. Plaintiffs, Respondents here, included both civilians and military veterans of the war in Vietnam. They sought relief for injuries incurred as a result of their exposure there to dioxin contaminants contained in the various herbicides produced by defendants. Shirley Ivy, et al. v. Diamond Shamrock Chemicals Co., et al., No. A890389C, (128th Dist. Texas) ("Ivy"). Because of the twenty year or more latency period for the serious diseases caused by dioxin, these plaintiffs' injuries had neither occurred nor been discovered, and their claims had not yet arisen under state law, at any time prior to May 7 1984, at the earliest.

The defendants, including a Texas corporation, Petitioners here, filed a Notice of Removal in June 1989 under 28 U.S.C. § 1441, seeking removal of a notional "federal question" in Ivy to the U.S. District Court for the Eastern District of Texas. Defendants asserted such a removable federal question on the basis of an alleged (but unpleaded) federal defense, in direct violation of the "well-pleaded" complaint rule.

Defendants at the same time sought multidistrict litigation ("MDL") transfer of Ivy from the Eastern District of Texas to the Eastern District of New York. Before the MDL Panel, plaintiffs challenged the jurisdiction of the federal courts to make an MDL transfer where federal jurisdiction was obviously lacking under existing law, and also where no case was pending pretrial in a different

district as required by the transfer statute, 28 U.S.C. § 1407(a). But the Court of Appeals held, for the first time, that neither the MDL panel nor the Court of Appeals reviewing an MDL transfer order had authority to determine its own jurisdiction. Ivy v. Diamond Shamrock Chemical Co., 901 F.2d 7 (2d Cir. 1990). The Court allowed a transfer to Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York under a newly created "inherent" judicial power to determine federal jurisdiction. See id. at 9.

Plaintiffs filed their Motion for Remand in the U.S. District Court for the Eastern District of New York on October 25, 1990. After long delays requested by defendants, the remand motion was fully briefed, and then argued by plaintiffs on March 6, 1991, after which the district

court allowed the defendants even further delays, enabling them to file a motion to amend their 1989 Notice of Removal. Defendants' April 23, 1991 amendment, being almost two years late, violated the 30 day limit on filing such notices. See 28 U.S.C. § 1446(b). This late amendment, sought to present for the first time the § 1442(a)(1) removal claim upon which defendants now seek appellate review.

Subsequently the district court also allowed defendant, both before and after judgment, to supplement the record with massive attempted proofs of the claim, advanced in the Amended Notice of Removal, that Petitioners were persons acting under a federal official in their production of dioxin-contaminated herbicide. Plaintiffs opposed this claim with their own evidence of contrary facts.

The district court issued several

rulings on Mrs. Ivy's motion to remand. It held that the military veterans' claims could be removed from state court, though there was admittedly no independent ground for jurisdiction, by reason of either diversity or federal question. Ivy v. Diamond Shamrock, 781 F. Supp. 902 (E.D.N.Y. 1991). A86, A90. The court found that it had predetermined the res judicata effect of its own previous order adopting a 1984 class action settlement of a diversity case in Ryan v. Dow Chemical, 618 F.Supp. 623 (E.D.N.Y 1985), aff'd 818 F.2d 145, 151 (2d Cir. 1987), cert. denied 484 U.S. 1004 (1988). The Ryan plaintiffs had raised claims similar to those in Ivy, but had settled those claims for "nuisance value" on May 7, 1984 before the Ivy claims arose. Petition ("Pet.") 4; see A94, A97.

In an uprecedented ruling the

district court held that its predetermination of the preclusive effect of the Ryan settlement provided it with federal jurisdiction to remove a case of a putative absent class member whose state tort claim had not yet even arisen at the time of the 1984 settlement. See A87-99. The Ivy plaintiffs after first seeking rehearing, see Memorandum of Law, Toxic Chemicals Litigation Reporter 14,986 (November 14, 1991), appealed this ruling to the U.S. Court of Appeals for the Second Circuit where it is awaiting oral argument.

As to the civilian plaintiffs, who are Respondents here, the district court found that removal was improper, since they were not even arguably party to the class action settlement. The district court thus concluded that the civilian cases must be remanded for "lack of

subject matter jurisdiction." See Memorandum, Order, and Judgment of Dismissal, Ivy v. Diamond Shamrock Chemicals Co., No. 89-3361, (E.D.N.Y. October 4, 1991), at 4, 46, Toxic Chemicals Litigation Reporter 14,839, 14840, 14861 (October 10, 1991) ("Order"); cf. A61, A81, A101. The court severed these claims, A86, and then reaffirmed its remand order, notwithstanding defendants' argument, on rehearing, claiming that the civilian claims could be removed under § 1442. See Ryan v. Dow Chemical, 781 F. Supp. 934 (E.D.N.Y. 1991) (civilian claims) reh'g granted, No. 89-3361, (E.D.N.Y. February 7, 1992), modified and aff'd. (March 30, 1992), appeal denied, No. 92-8008 (2d Cir. May 8, 1992)(mem.) reh'g denied, (June 8, 1992)(mem.) appeal dismissed, No. 92-7487 (2d Cir. June 16, 1992), appeal withdrawn No. 92-7615 (July

28, 1992)(mem.) petition for cert. filed sub nom. Dow Chem. Co. v. Brown (U.S. September 8, 1992)(No. 92-438)("Brown").

The district court's opinion in the Brown case, id., explained the reasons for the remand. This opinion accepted defendants' argument that cases such as International Primate Protection League v. Administrators of Tulane Educational Fund, __ U.S.__, 111 S.Ct. 1700 (May 20, 1991) and Roche v. American Red Cross, 680 F. Supp. 449 (D.Mass. 1988), which have limited § 1442(a)(1) removal to natural persons, should not be followed to preclude these corporate defendants from invoking the "federal officer" removal statute. A39.

The district court's opinion also adopted a novel analysis allowing the late amendment of the removal notice. Although the amendment admittedly added new

substantive allegations on a claim not mentioned in the removal notice, the court first found these allegations were hinted at by a defense, which related in some fashion to the factual grounds needed to support the late removal claim, which the court found the defendants intended to -- though they did not actually -- plead in their answer. The court then held there was "sufficient evidence before the court," in the file of a previous case, about the facts concerning this defense that were similar to the facts underlying the § 1442 claim. A23-27. Accordingly, though defendants had neither sought a § 1442(a) removal nor provided any facts to support such a claim in their 1989 Notice of Removal, through a notion permitting "notice" based on such clues, the court found the late amendment acceptable because the court itself from its

experience in another case could intuit and furnish all the essential but missing elements for a valid notice of removal under § 1442(a).

Notwithstanding these rulings, the district court confirmed its remand of the Brown case. It held that defendants' massive attempted proofs had failed to show "[t]he necessary direct and detailed official control over the acts for which the defendants are now being sued," 781 F.Supp. at 950-51, so as to support federal officer removal under § 1442.

The district court then certified its decision to remand the civilians' case for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). Defendants petitioned the Court of Appeals for permission to appeal under § 1292(b), and also filed a notice of appeal, presumably invoking the collateral order doctrine. The Court of

Appeals denied the petition for interlocutory appeal, and dismissed the collateral order appeal, apparently indicating at oral argument that no petition for mandamus would be entertained either. As a result, all of Petitioners' theories for appeal were rejected by the Court of Appeals.

SUMMARY OF ARGUMENT

Respondent Charles Brown opposes the Petition for Writ of Certiorari. Though the underlying case is profoundly significant to him and others, and relates to an important chapter of American history, the precise procedural issue at stake here is not of great moment. The precise issue presented has never arisen before and is not likely to recur often. There is no division among the Circuits on any dispositive issue raised by the Petition. The underlying appeal is of

little jurisprudential importance because it seeks no more than a second opinion on the trial court's findings of fact, and can affect nothing more than the forum where Mr. Brown's claims may be tried.

Petitioners seem for the most part to seek advisory opinions from this Court on potentially conflicting theories primarily of their own creation. But these theories had no bearing on the outcome of the case below, which did not theorize, but rather summarily applied a well known rule to uncomplicated facts so as to deny a discretionary appeal.

The uncontroversial rule which has been in place through most of our constitutional history holds that a remand to state court for lack of federal subject matter jurisdiction is not appealable. The trial court undeniably remanded for that reason, under 28 U.S.C. § 1447(c), on

account of defendants' inability to prove facts necessary for removal by federal officers under § 1442, see A54, A57, or any other provision.

Petitioners posit that a party whose separate claims lacked any basis for federal jurisdiction when removed in 1989 was nevertheless properly removed as "pendent" to other parties until the time of a "discretionary" severance and remand. Pet. 12. If this were true, defendants would claim, the remand must have been other than under the non-discretionary remand provision, § 1447(c). But Petitioners cite no authority whatsoever for their theory, which directly contradicts this Court's opinion in Finley v. United States, 490 U.S. 545 (1989). That case foreclosed any "pendent party" jurisdiction and made remand of such parties mandatory, not discretionary.

Petitioners also seek to restrict § 1447(c) remands by giving to the statutory term "case" a restrictive interpretation that would exclude its application to all of the claims of a single co-plaintiff. Petitioners would use the term only to denote all claims of all parties in an action. But Petitioners can find no precedent to support this definition, let alone a division in the Circuits. The definition is too restrictive and defies the flexible, general usage of the term "case" in a variety of contexts.

In the ordinary meaning of the term, Charles Brown had a "case" in 1989 that required remand under § 1447(c) from the time it was removed, even if it had been joined with the "cases" of other plaintiffs whose claims could be removed. Therefore the order remanding his case is non-appealable under § 1447(d).

Every Circuit Court allowing appellate review of a remand order has limited that review to situations where the district court's basis for remand was not founded in the statutory grounds contained in § 1447(c). Petitioners' attempt to justify their appeal by bringing it within the class of cases that are remanded on grounds other than § 1447 fails, because it is not grounded in fact or law. No court, other than perhaps the district court below, has held that § 1292(b) is not just the means for taking an appeal of a remand order not prohibited by § 1447(d), but itself would qualify and delimit the scope of § 1447(d).

Defendants' proposed rule for reconciling a conflict they perceive between these two statutes, which no other court has ever found, is that a § 1292(b) appeal of a remand order should be per-

mitted either when the order is stayed or when appeal would prevent delay. There is authority neither for the former, a purely verbal formula for judicial repeal of the statute, nor for the latter, which is inapplicable to this case in any event. Trial of this case would only be delayed further by an appeal of the jurisdiction issue, precisely what Congress sought to avoid by maintaining the equivalent of § 1447(d) on the books for most of two centuries.

Petitioners attempt to argue, as they must, that there is a division of the Circuits on these issues. But with the exception of the district court below as to one issue, no single Court has ever even addressed these issues and theories that Petitioners now raise to challenge the Second Circuit's decision, and on which Petitioners seek Supreme Court

review. In order to furnish some semblance of conflict to warrant grant of the writ, therefore, Petitioners present an argument that there is conflict over the means for raising the question of reviewability of a remand order in the Courts of Appeals. Nct only is this an issue of little note, but it would not affect the outcome of this case however it is resolved because the Second Circuit denied all avenues of review.

On this and other issues the Petition seeks an advisory opinion from this Court on matters of intellectual interest that are neither significant for the administration of the federal courts, nor dispositive of the ruling by the Court of Appeals. Because the appeal defendants seek is one for reassessment of their massive factual evidence which failed to persuade the trial judge that they were

working under a federal officer in committing the act complained of, denial of an appeal will have no measurable consequence for future cases.

Advocating a new set of rules for reviewability that no court has ever mentioned or adopted, Petitioners suggest that the "importance" of its factual issue warrants § 1292(b) appeal. But the Court of Appeals' exercise of discretion under § 1292(b) is not subject to review. If this Court were to review the Court of Appeals' exercise of its discretion to reject a § 1292(b) appeal, it would also have to consider the alternative bases for upholding its decision set forth in the respondents' statement of Questions Presented.

This Court has authority under § 1447 to award, or to direct the lower courts to award attorney fees on account of expenses unnecessarily incurred by plaintiff in

opposing defendants' attempts to appeal a non-appealable order. Such an award would be consistent with the purpose of the statute and deter future abuses.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied on each of the three questions presented by Petitioners for the reasons stated below.

I. PETITIONERS' QUESTION I RELIES ON A NOVEL DEFINITION OF A "CASE" NEVER ADOPTED BY ANY COURT, AS WELl AS A THEORY OF "PENDENT PARTY" JURISDICTION REPUDIATED BY THIS COURT, AND IGNORES THE ACTUAL BASIS FOR THE DISTRICT COURT'S DECISION

In its several statements of its first question presented, the Petition carefully avoids asserting that the Court of Appeals actually committed error in this case by denying defendants permission for a § 1292(b) interlocutory appeal of an order remanding this case for lack of any "basis for federal subject matter

jurisdiction." A57. Instead, Petitioners complain of possible conflicts between other courts on other issues, and ask "whether there is appellate jurisdiction to review" this case in the abstract. Pet. 7. However certiorari will not be granted to determine whether the Court of Appeals' could have accorded review under § 1292(b), if it had chosen to do so.

Thermtron Products v. Hermansdorfer, 423 U.S. 336, 343 (1976), provides a complete and absolute prohibition of any appeal from a remand order grounded exclusively in § 1447(c), but left open the possibility of review, by mandamus, of remand orders based on other grounds. Decisions from different Circuits have applied this rule to different factual circumstances. These cases have generated some legal arcana of some intellectual interest, but without much controversy or

importance in the overall administration of the federal courts.

Petitioners seek to create a conflict between these decisions and what the "Second Circuit apparently thought," Pet. 9, when it summarily denied appeal of the remand order in this case, citing Thermtron. But Petitioners are unable to cite any case that is inconsistent with the result of the Second Circuit's summary denial and dismissal of defendants' appeal of a § 1447(c) remand order, the only basis on which plaintiffs had moved for remand. See A54. Thus there is no division in the Circuits on Petitioners' Question I, because each case cited by defendants presents a different set of facts from this case. Even the theoretical analysis of rules that defendants essay for purposes of creating a conflict with what the "Second Circuit apparently thought"

finds no support in the cases.

Petitioners start their argument from the premise that federal jurisdiction depends upon the state of the facts at the time of removal, Pet. 10. They then contend that the severance of Mr. Brown from his co-plaintiffs was "equivalent for jurisdictional purposes to the substitution of parties ... and the withdrawal of federal claims" which other Courts have held to change the factual basis for jurisdiction after removal. Therefore, Petitioners conclude, the Ivy "case" including Brown's claims can be deemed removable up to the point of severance. By this verbal formula parties with claims that cannot be removed, could be remanded under some provision other than § 1447(c), which permits remand solely of a "case" improperly removed. There are several problems with this argument.

First, Petitioners' contention that "the court had jurisdiction over the entire case, including the pendent civilian respondents," Pet. 12 (emphasis added), is unsupported by authority. Petitioners rely on cases such as Carnegie Mellon, Pet. 10-12, which permits discretionary remand, and hence review of the remand, of a party's pendent claims. But Petitioners carefully avoid comparing those cases to the cases asserting jurisdiction over a pendent party.

While non-removable state claims of a party may be removed as pendent to that party's removable claims, parties having no removable claims could not be removed as pendent to other parties who did have removable claims. Finley v. United States, 490 U.S. 545 (1989). Therefore at the time of removal, Mr. Brown and his

claims, whether denominated a "case," "action," "suit," or otherwise, were not removable and required remand if they were removed. The Brown case was therefore properly remanded under § 1447, and not under any discretionary power to remand a "pendent" party.

Petitioners claim that remand was ordered "[o]nly after a discretionary ... severance." But in fact the district court ordered the case remanded in October, ordered severance in November, and, after reargument, published its opinion explaining the reasons for these rulings in January. The severance was not a discretionary condition precedent to the remand but an inevitable result of the mandatory remand order.

Even if there had been a "pendent party" basis for jurisdiction over Mr. Brown, which there was not, defendants

waived this hypothetical ground for making Mr. Brown's claim removable in 1989 by failing to raise the issue in their 1989 Notice of Removal within 30 days of receiving the complaint. § 1446(b). No mention of a "pendent party" basis for removal of civilian claims is found in the original notice, nor even in the late 1991 Amended Notice of Removal, nor in any of defendants' numerous briefs or arguments in various hearings and rehearings on the issue below. This ground for removal, now argued for the first time, was waived if it had ever existed.

Indeed, in 1989, the Notice of Removal stated no grounds upon which the civilian claims could be removed at all, whether "pendent party" or any other basis. Therefore they were not removable at all in 1989 under any circumstances, consistent with § 1446. There being no

"pendent party" basis for federal jurisdiction available or claimed at the time of removal, the severance of Mr. Brown's claim from the other parties' claims did not affect federal jurisdiction over his case in any way.

Second, Petitioners' definition of the statutory term "case" to mean "entire case" is too precious. Petitioners cite no authority for so defining a "case" that shall be remanded under § 1447(d) to exclude reference to all claims of a single party joined with other parties in one action. The term "case" is a flexible one that can easily bear this meaning, and also include all the claims of all parties in an action, as Petitioners contend. "Case," like "action," is a general term that cannot be rigidly hedged into the single narrow meaning Petitioners seek, while excluding other possible meanings.

Both words "might mean one thing for one purpose and something different for another." United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933).

In the ordinary meaning of the word, Mr. Brown's "case" was permissively joined with Mrs. Ivy's and others for filing in 1989. Mr. Brown's "case" was removed in 1989, when, lacking any legal authority for "pendent party" jurisdiction, each plaintiff had to have, from the outset, some independent jurisdictional bottom for any federal subject matter jurisdiction that might be asserted over them. Since this Court expressly precluded any such thing as "pendent party" jurisdiction, Finley v. United States, supra; see Zahn v. International Paper, 414 U.S. 291, 301 (1973)(diversity), there was no ground for

removing Brown in 1989. 1/ Upon motion to remand, or whenever "it appears that the district court lacks subject matter jurisdiction," § 1447(c), the federal court had no discretion but to sever and remand. In the terms of the statue, "the case shall be remanded."

Petitioners' "entire case" removal argument also depends upon the assumption that removal of the veterans' cases was proper in 1989. That issue is presently on appeal. It would be inappropriate for this Court to reach Petitioners' argument, that the remand of Brown's case is appealable because his case was removable in 1989 as "pendent" to a removable "entire case," unless it first accepts the

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1/ Although Finley was overruled in part by Congress in 1990, when it enacted 28 U.S.C. § 1367, that enactment can have no application to this case. It applies only to cases commenced after November 30, 1990. Pub. L. No. 101-650, § 310(c).

premise that the removal of the veterans was itself proper at that time. Otherwise the "entire case" was improperly removed as plaintiffs have consistently contended. Though plaintiffs are not submitting with this opposition their 100 page Brief for Mrs. Ivy et al., filed in the Second Circuit, showing the total absence of any authority to support the removal of the veterans' cases, these issues would need to be litigated in this Court if Petitioners were allowed to premise the reviewability of the remand of Mr. Brown's claims on a "pendent party" theory.

II. THERE IS NO CONFLICT WITH ANY CIRCUIT ON THE SUPPOSED NEED TO RECONCILE 28 U.S.C. § 1447(d) AND 28 U.S.C. § 1292(b), AND PETITIONERS' RECOMMENDED RESOLUTION OF THE ALLEGED CONFLICT -- A PREVENTION OF DELAY TEST -- WOULD NOT REQUIRE REVERSAL OF THE RULING BELOW

Petitioners invite this court to explore the "apparent conflict between §

1292(b) and § 1447(d)." Pet. 20. The latter statute prohibits review of a remand order "on appeal or otherwise" and would therefore apply equally to a § 1292(b) interlocutory appeal as it would to a § 1291 collateral order appeal, or even a § 1651 mandamus action.

Remand orders have traditionally been non-appealable because they lack finality. E.g. Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. Roberts, 141 U.S. 690 (1891); Railroad Co. v. Wiswell, 90 U.S. (23 Wall) 507 (1875). Some Courts of Appeals have ruled, however, that the narrow class of remands that are made on grounds other than § 1447(c), such as under a contractual forum selection clause, may avoid this rule and be appealed as collateral or interlocutory orders, in addition to the mandamus route approved in Thermtron.

In an appropriate case the Second Circuit may well also review such a remand order. The denial of review for which the writ is sought here, however, simply found that Brown was not that appropriate case. As discussed above, defendants cite not a single precedent for holding a remand order appealable under the circumstances of this case. Moreover, a variety of arguments, in addition to those stated in the Thermtron opinion, would support the Second Circuit's discretionary decision to deny a § 1292(b) appeal. Whether or not an advisory opinion by this Court may be useful in reconciling any conflict that might be imagined in the context of a different case, there is no conflict between § 1447(c) and § 1292(b) as applied in this case. Both statutes support the denial of appellate review of the order remanding Mr. Brown's case to state court.

Petitioners seem to suggest, taking their lead from the district court, that in every case where a district judge certifies a remand order for interlocutory appeal under § 1292(b), the certification should override § 1447(d)'s express prohibition of any kind of review, whether of a final or interlocutory nature. This proposed authority to overrule the express command of § 1447(d) would apparently be available if the district court chooses to stay its remand order. See Pet. 18; A56-57. Aside from the district judge's inventive opinion below, only one case is cited to support this proposition, In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991 cert. denied sub nom. Gumby v. General Pub. Util. Co., 112 S.Ct. 1962 (1992). Id.

In re TMI does not support such a rule. In re TMI expressly ruled that the

existence of the stay was not determinative of its decision. 940 F.2d at 847 n. 9. Instead, the Third Circuit in In re TMI painstakingly pointed out the unprecedented facts that did lead it to resolve the "unique" dilemma presented in that case by reviewing a remand order, aside from the fact that "the district court ... certifie[d] th[e] question." This reason was the lower "court's decision that the statute which purports to confer federal jurisdiction is unconstitutional." The court emphasized that its "ruling is a narrow one." Id. at 847, and that "[n]o case ... has addressed the particular constitutional dilemma presented," id. at 836.

In Thermtron, 423 U.S. at 351, this Court said,

> we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal

> statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

In re TMI thus interpreted Thermtron to make appealable a remand based partly on the constitutional grounds held to invalidate the removal statute itself, rather than solely under the statutory ground established by Congress in § 1447. To be non-appealable under § 1447(d), the Third Circuit held, "a remand order must be based upon a finding that removal was not authorized by Congress." Id. at 845. The Third Circuit reasoned that Congress had intended the district courts to be the final arbiters of whether Congress intended a case to be removable, but not whether the removal statutes enacted by Congress are themselves constitutional. See id. at 843.

Because they cannot argue that the

district court's remand in this case was based on any finding other than that removal was not authorized by Congress in § 1442(a), Petitioners' reliance on In re TMI is seriously misplaced. In re TMI held a remand order appealable for a reason that had never occurred before, as the Third Circuit observed, and may well never occur again. It has certainly not occurred in this case. The district court did not hold unconstitutional a statute otherwise permitting removal of the Brown case. The district court's decision did not even turn on a point of law.

Indeed this case presents the opposite situation where the district court removed Brown's co-plaintiffs' "cases on grounds that seem[ed] justifiable to [it] but which are not recognized by the controlling statute," 423 U.S. at 351, and are therefore now

under challenge by the Ivy plaintiffs in the Second Circuit. In Brown the district court simply refrained from revising the federal removal statutes, as it did in Ivy, and remanded, according to law, for lack of any "basis for federal subject matter jurisdiction" on the facts adduced by Petitioners. 781 F.Supp. at 953.

Petitioners try to invoke an analogy to In re TMI by neglecting to frankly state the "unique" reason the court gave for allowing an appeal in that case. The Petitioners would thus invite this Court to falsely analogize between a case involving "an unsettled question of constitutional proportion" concerning a jurisdictional statute and the alleged "importance" of Petitioners' substantive defenses in this case. Pet. at 17. But the question of fact which the district court resolved against Petitioners is

poles apart in "importance" from a constitutional question.

Respondents' alternative grounds to support the remand are far more significant, but are also largely of non-constitutional stature, and would not furnish support for the Petitioners' request that a writ be granted. Application of Petitioners' proposed "importance" rule would require an analysis of the alternative bases for supporting the Court of Appeals' denial of the § 1292(b) petition, such as that the factual issue in Brown was not "important," that the notice amendment was wrongly permitted, and that weaknesses in jurisdiction over the claims to which Petitioners argue Brown was a "pendent" party all made success unlikely on appeal. The Second Circuit has already held that claims such as Mr. Brown's implicate no

important federal interest. In re Agent Orange Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert denied, 454 U.S. 1128 (1981).

On the basis of their false analogy to In re TMI, Petitioners would have Mr. Brown join the Ivy plaintiffs on appeal to "prevent delay" of his case. Pet. 20. The prevention of litigation delays is the test Petitioners recommend for reconciling the supposed conflict between § 1447(d) and § 1292(b), when issues sought to be appealed are "important." Id. But even if this Court were to accept Petitioners' proposed new rule that would allow certified appeals from "important" remand orders whenever appeal would "prevent delay," this rule would not assist Petitioners in this case.

In this case the district court has clearly ruled that the civilians were not

part of the original Agent Orange settlement. Since no issue going to the merits is at stake on appeal in Brown, the allowance of an appeal could achieve no more than to determine whether the Brown case will be tried in Brooklyn federal court or a Texas state court.

Petitioners would have Brown join the Ivy plaintiffs' effort to reverse the novel "res judicata removal" of their cases, so that the Court of Appeals can at the same time further refine the district court's factual analysis and perhaps change its § 1442 determination as to where Mr. Brown should properly try his state tort suit. It is clear that to prevent future delay, as well as to remedy past delays, in the manner that Congress intended § 1447(d) to accomplish, this Court would need to deny the writ with instructions to the Court of Appeals to

award attorneys fees under § 1447(c) for the serious, unwarranted delays in Brown which Petitioners' appeal of clearly non-appealable remand orders has caused.

The argument that a particular federal judge will try these cases more expeditiously than any state court, see Pet. 20, is a red herring. No judge, federal or state, has yet brought to trial any case alleging injuries from Agent Orange in Vietnam. Collateral estoppel is as effective as joint trials to reduce duplication of effort in a personal injury suit. Because of the different latency periods for manifestation of injury, and the geographical distribution of the plaintiffs, all such cases cannot be tried together in one court in any event.

III. ANY CONFLICT IN THE CIRCUITS AS TO THE PROPER "AVENUE" TO REVIEW REMAND ORDERS IS IRRELEVANT TO THIS CASE

Petitioners' Question III contends that there is a division in the Circuits

as to "the proper avenue for appellate review of remand orders." Pet. 21. But the several potential means for taking an appeal into the Circuit Courts is not a significant issue to occupy this Court's docket. This Court has secured one avenue for all Circuits, mandamus, while certain Circuits, under certain facts, have also permitted use of § 1291 or § 1292, as well. There is little reason for this Court to grant the writ to simply place its imprimatur on one such practice or another, which in any event is of greater administrative concern to the Circuits themselves, than it is to this Court.

Moreover whatever "avenue" of appeal this Court might endorse in addition to mandamus would be irrelevant to the outcome of this case. Petitioners advocate a § 1292(b) means for reviewing this case. Yet the Second Circuit denied appeal by <u>all</u> possible means, expressly

including § 1292(b). It did not select one means over another, nor did it refuse Petitioners' appeal on the ground that Petitioners selected the wrong route. Therefore, without sorting out the various cases cited by Petitioners to determine whether or not there is an actual conflict among the Circuits on this issue, it is clear that this is not the case to resolve any such potential "conflicts and uncertainties." Pet. 22.

Whichever such "avenue" this Court might endorse for presenting reviewable remand orders to a Circuit Court, that avenue was taken and the appeal was rejected by the Second Circuit. In view of the policy underlying the congressional mandate of § 1447(d), there was neither precedent nor any persuasive reason for the Second Circuit to hold the order remanding Charles Brown's case to state

court a usefully reviewable collateral or interlocutory order under § 1292(b). Whether or not it would be helpful to have an advisory opinion on this rather arcane question that seldom arises, it would not affect the outcome of this case and therefore cannot be a proper ground for invoking the jurisdiction of this Court.

IV. THIS COURT SHOULD PROVIDE FOR THE AWARD OF PLAINTIFFS' ATTORNEY FEES

The same statute which precludes appellate review of remand orders also provides for award of "attorney fees, incurred as a result of the removal." § 1447(c). In addition, another recent amendment, to § 1446(a), by its reference to F.R.Civ.P., Rule 11, underscores Congress' renewed intention that financial sanctions should be applied to defendants in appropriate remanded cases.

The expenses of defending against an

improper removal include defense of the remand order against an improper appeal. Appellate expenses, including those for this Opposition, may comprise a significant part of the total expenses resulting from an improper removal. The clear intent of Congress is to make attorney fees available against a defendant who improperly invokes the removal statute, thereby generating extensive litigation over forum selection, as this case has.

The intent to compensate the plaintiff who wins remand should be even more clear when the appeal of the remand order further aggravates the expense and delay, and also violates yet another section of the statute flatly prohibiting that appeal. In a case like this, where the differential resources available to the parties are lopsided in favor of the

removing defendants, and the proceedings have extended over more than three years, the statute should have special application to deter intentional abuse.

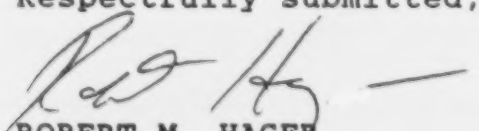
The district court refused to consider an award of sanctions, cf. A101, though its stay of the remand order and this appeal would seem to leave the question of fees open. See Southern and Eastern Districts of New York, Civil Rules, Rule 11. Cf. Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970). The added burden of appellate costs might change the district court's calculation. However this Court could effectively give meaning to the intent of Congress by expressly including in its denial of certiorari, or summary affirmance, a suggestion that an award of attorney fees should be taxed in the courts below. Failure to provide for the award

contemplated by Congress will deter plaintiffs from opposing the improper removal of state cases to federal court.

CONCLUSION

The petition for writ of certiorari should be denied, or the judgment below summarily affirmed, and this case returned to the Court of Appeals with an express order for the award of plaintiffs' costs and fees for opposing the appeal of the remand order.

Respectfully submitted,



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NO. 92-438

In The Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

against,

CHARLES BROWN and JAMES WHITE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF CLARENCE WHITE, DECEASED

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

(Respondent White's Version)

1. Whether, since the district court expressly stated that it was remanding the civilian cases because of absence of subject matter jurisdiction, thus remanding pursuant to 28 U.S.C. 1447(c), appellate review in any form - by mandamus, as a Cohen collateral order, or by way of interlocutory appeal under 28 U.S.C. 1292(b) - is absolutely precluded by 28 U.S.C 1447(d).

2. Whether, even if remand had not been made pursuant to 1447(c) and appellate review was potentially possible, the only potential means of review would be by way of mandamus.

3. Whether, even if remand had not been made pursuant to 1447(c) and appellate review was potentially possible by way of mandamus, such review would be

wholly inappropriate because the presence of subject matter jurisdiction under 28 U.S.C. 1442(a)(1) is not "clear and indisputable" and, on the contrary, in the most favorable light for Petitioners is, at best, as the District Court noted, a "close question".

4. Whether, even if remand had not been made pursuant to 1447(c), mandamus was not the only means of review, and appellate review by way of a 1292(b) interlocutory appeal would be potentially possible, such review of any kind in this Court would be appropriate in light of the fact that the Court of Appeals exercised its unassailable discretion to decline such appeal.

5. Whether, even if remand had not been made pursuant to 1447(c) and even if mandamus was not the only means of review, and appellate review was potentially possible as a Cohen collateral order, the

dismissal by the Court of Appeals of the Petitioners' attempted Cohen appeal was correct because the question of jurisdiction in this case involves "considerations that are enmeshed in the factual and legal issues comprising the Plaintiffs' cause of action" and Petitioners will be able to have a fair hearing on the military contractor defense and the Defense Production Act (50 U.S.C. App. 206 (et seq. (1988), and other issues related to their asserted application of 28 U.S.C. 1442(a)(1), in the Texas state court.

6. Whether, in view of the fact that there are no conflicts in the decisions of the courts of appeal with regard to the real issues pertaining to the availability of appellate review; the underlying merits of this case (whether the district court had removal jurisdiction under 28 U.S.C. (1442(a)(1));

and the erroneous granting of leave to the Petitioners to amend their removal petition to include 1442(a)(1) as a ground for removal, the decision of the Court of Appeals in this case departed "from the accepted and usual course of judicial proceedings", or sanctioned "such a departure by a lower court", that this case is an appropriate one "for an exercise of this Court's power of supervision".

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APPENDIX

Appendix A - Section 1441(c) of Title 28 of the United States Code A1

NO. 92-438

In The Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

against,

CHARLES BROWN and JAMES WHITE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF CLARENCE WHITE, DECEASED

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

In accordance with Rules 15 and 24.2 of the Supreme Court Rules, Respondent James White, Individually and as Representative of the Estate of Clarence White (hereinafter, "Respondent White"), hereby adopts Petitioners' list of all parties, as required by Rule 24.1(b); citation of opinions and judgments

delivered in the courts below, as required by Rule 24.1(d); statement of grounds on which the jurisdiction of the Supreme Court is attempted to be invoked by Petitioners, as required by Rule 24.1(e); and the list of relevant statutes and rules, as required by Rule 24.1(f), except that Respondents would add 28 U.S.C. 1441(c) which is quoted in Appendix A, attached hereto.

STATEMENT OF THE CASE

Respondents adopt Petitioners' statement of the case, except for the hereinafter stated additions and modifications.

The Petitioners' statement at p. 4 of their Petition - that "all but two of the thirty-four original Plaintiffs in the present litigation were veterans and their family members (the 'veteran plaintiffs') and thus were not part of the

Agent Orange class" - is simply not correct. M.D.L. 381 included only those veterans who had manifested their injuries at the time of the class settlement. The thirty-two veterans and their family members in the present "litigation" did not manifest any injuries from exposure to Agent Orange until long after the class settlement in M.D.L. 381.

The essence of the appeal filed by the thirty-two veteran plaintiffs, complaining of the District Court's erroneous failure to remand their actions to state court and the erroneous dismissal of their claims, is that they were not a part of the class whose claims were settled in M.D.L. 381.

In any event, the most glaring omission in Petitioners' statement of the case is their failure to mention that they did not attempt to amend their removal

papers to assert 28 U.S.C 1441(a)(1) as a ground for removal until several months after suit had been filed in the state court of Texas. The District Court explained the situation this way:

> "After the civilian actions were commenced as part of the **Ivy** action in Texas state court, defendants removed to federal court. Section 1442(a)(1) of Title 28 was not mentioned in the initial notice of removal. Instead, the removal notices in both the **Hartman** and **Ivy** cases mentioned only "artful pleading," "federal question" and "federal preemption" grounds for removal. See **In re "Agent Orange" Prod. Liab. Litig.**, 781 F.Supp. 902, (E.D.N.Y. 1991). The removal notice did cite **Boyle v. United Technologies Corp**, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), - a case outlining the federal common law military contractor defense - but only to support the "federal preemption" basis for removal. The issue of section 1442(a)(1)'s applicability was not explicitly raised until 1991, when defendants filed their motion for leave to amend their notice of removal under 28 U.S.C. § 1653."

pp. A20, A21 of Petition.

The District Court went on to

conclude that the year-late amendment should be permitted. See A23 -A27. It erroneously based its decision upon the fact that Petitioners had, in the unrelated M.D.L. 381, raised the Defense Production Act issue, strangely somehow extrapolating the M.D.L. 381 proceeding into adequate notice to those civilian plaintiffs, whom the District Court admitted were not a part of that proceeding, of what went on in that proceeding. Id.

Finally, the Petitioners did not make it clear in their Petition what the basis of the District Court's grant of the civilian plaintiffs' motion to remand was. The District Court unquestionably based its decision to remand upon the absence of subject matter jurisdiction. The Court stated:

"The defendants have not met their

> burden of establishing that they were 'person[s] acting under' federal officers within the meaning of section 1442(a)(1). No other basis for federal subject matter jurisdiction having been shown, the actions of Charles Brown and Clarence White are remanded to Texas state court."

A57 of Petition; emphasis added.

I.

THE LAW IS PLAIN AND CLEAR AND THERE IS NO DISPUTE AMONG THE COURTS OF APPEALS THAT 1447(d) ABSOLUTELY PRECLUDES ANY FORM OF APPELLATE REVIEW BY DEFENDANTS WHEN PLAINTIFFS' MOTION TO REMAND HAS BEEN GRANTED FOR ABSENCE OF SUBJECT MATTER JURISDICTION, AS DESCRIBED IN 1447(c).

The Petition for Writ of Certiorari filed by the Petitioners is frivolous and clearly sanctionable. As noted in the Statement of Case above, it cannot be disputed that the civilian plaintiffs' case was remanded because of the absence of subject matter jurisdiction. § 28 U.S.C. 1447(c) states:

> "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

A149.

28 U.S.C. 1447(d) provides:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

A150.

In **Gravitt v. Southwestern Bell Telephone**, 430 U.S. 723, 97 S.Ct. 1439 (1977), a tort action was removed from the Texas state court to federal district court and the district court remanded the case because of what it perceived as absence of federal subject matter jurisdiction. The court of appeals, by mandamus, "ordered the District Court to vacate its remand order because the latter had employed erroneous principles in concluding that it was without jurisdiction".

This Court reversed and forcefully stated in its per curiam opinion:

"The Court of Appeals erred. Title

> 28 U.S.C. §1447(c) provides for remanding a removed action when the district court determines that 'the case was removed improvidently and without jurisdiction'; and when remand has been ordered on these grounds, 28 U.S.C. 1447(d) unmistakably commands that the order 'remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ..' The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise."

97 S.Ct. at 1440; emphasis ours. See also **Thermtron Products, Inc. v. Hermansdorfer**, 423 U.S. 336, 96 S.Ct. 584 (1976) (holding that if a removal is made pursuant to 1447(c)), appellate review by any means is absolutely prohibited by 1447(d) [1] and **Carnegie-Mellon University**

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1 After quoting 1447(d), this Court stated:

> "It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its

v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (holding that, despite some language in **Thermtron** possibly to the contrary, federal district courts have the power to remand on grounds other than those stated in 1447(c) and that the federal district court in that case had the power to remand pendent, state-law claims).

The holdings in **Thermtron** and **Gravitt**, to the effect that no appeal, in any form, is permitted when the dismissal is based upon the absence of subject matter jurisdiction as provided for in 1447(c), have been accepted and fully applied without exception or modification, by every court of appeals decision dealing with the subject. **Krangel v. General Dynamics Corporation**, 968 F.2d 914 (9th

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predecessors stretching back to 1887." 96 S.Ct. at 589.

Cir. 1992) (rejecting an interlocutory appeal in a case where removal had been attempted, as in this case, under 28 U.S.C. 1447(a(1) and the district court had remanded to state court); **Kolibash v. Committee on Legal Ethics of W. VA. Bar**, 872 F.2d 571 (4th Cir. 1989) (after recognizing that 1447(c) remands are not reviewable, allowed review of remand order which "represented a discretionary decision by the district court not to hear a certain case [over which it had subject matter jurisdiction] on grounds of public policy", because the remand was outside the parameters of 1447(c); **Bregman v. Alderman**, 955 F.2d 660 (11th Cir. 1992) (holding that remand order which did not contain an express finding that diversity of citizenship did not exist would still be presumed to be a remand for absence of subject matter jurisdiction and appellate

review of same by way of mandamus was absolutely prohibited);[2] **Matter of Amoco Petroleum Additives Co.**, 964 F.2d 706, 709, 708-710 (7th Cir. 1992) (rejecting review of remand order by way of mandamus; the court held that remands on grounds other than under 1447(c) are reviewable by way of mandamus, but 1447(c) remands are "untouchable"); **Calderon v. Aerovias**

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[2] The Court of Appeals stated:

> "While the court did not make an actual finding regarding whether diversity, in fact, existed, it is clear from the remand order that the court believed that this failure of the pleadings to allege the citizenship of the parties translated into a lack of subject matter jurisdiction. . . .As in **Gravitt**, the district court's conclusion may well have been mistaken and clearly was made without a finding as to diversity of citizenship in fact. However, the Supreme Court in **Gravitt** made it clear that §1447(d) bars review of such remand order even though the district court may have 'employed erroneous principles in concluding that it was without jurisdiction'."

430 U.S. at 723, 97 S.Ct. at 1440.

Nacionales de Colombia, 929 F.2d 599, 601-603 (11th Cir. 1991); **Melahn v. Pennock, Ins., Inc.**, 965 F.2d 1497, (8th Cir. 1992) (acknowledged rule that 1447(c) remands are not subject to appellate review and then held that a remand based on abstention is not a 1447(c) remand and thus such remand was reviewable by way of mandamus); **Corcoran v. Ardra Insurance Co., Ltd**, 842 F.2d 31, 33-35 (2nd Cir. 1988) (after noting that 1447(c) remands are not reviewable by any means, held that remands based on abstention are not within the scope of 1447(c) and could be considered by the appellate court only by way of mandamus); **McDermott International vs. Lloyds Underwriters of London**, 944 F.2d 1199, 1204 (5th Cir. 1991) (holding that "Congress prohibits us from reviewing remand orders based on §1447(c)"); **Karl Koch Erecting Co. v. NY Convention Ctr.**

Dev., 838 F.2d 656, 658, 659 (2nd Cir. 1988) (after concluding that 1447(c) prohibits appellate review where a remand is based upon 1447(c), the Court held that a remand based on a forum-selection clause does not constitute a 1447(c) remand and therefore was reviewable by way of direct appeal); **Tillman v. CSX Transportation, Inc.**, 929 F.2d 1023, 1026, 1027 (5th Cir. 1991) (holding that district court's 0remand order, based on mistaken assumption that it had lost subject matter jurisdiction after adding state agency as a party, was not reviewable by mandamus or otherwise, even if clearly erroneous); [3]

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[3] The Court in Tillman stated:

"Through the prohibitory effect of 28 U.S.C. §1447(d), remand orders under §1447(c) are not reviewable on appeal, by mandamus, or otherwise, except in civil rights cases. . .. In its remand order, the trial court never mentioned §1447(c) . . . . the appellants argue that the failure to cite to § 1447(c)

Survival Systems Division of the Whittaker Corp., et al v. U.S. Dist. Ct. for Southern District of California, 825 F.2d 1416, 1418 (9th Cir. 1987); **Nasuti v. Scannell**, 792 F.2d 264, (1st Cir. 1986) (suit under the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982), removed to federal court; federal district court remanded to state court; Court of Appeals rejected appellate review, holding that 1447(d) applied to the statutory removal under the Federal Drivers Act); **Ochoa**

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places this remand within the small class of cases that fall under the **Thermtron** exception to § 1447(c). . . Although the trial court neither quoted the actual language of § 1447(c) nor cited to the statute, the remand order provided that appellee's 'amendment would destroy subject matter jurisdiction in this court.' This ground comes literally within §1447(c). Thus we are precluded from reviewing the remand order on appeal, by mandamus, or otherwise. See **Merrimack**, 587 F.2d at 647, 648."

928 F.2d at pp. 1026, 1027.

Realty Corp. v. Faria, 815 F.2d 812, 815 (1st Cir. 1987) (held that 1447(d) applies to federal question removals); **First National Bank of Salem v. Wright**, 775 F.2d 245, 246-7 (8th Cir. 1985); **Division of Archives v. Austin**, 729 F.2d 1292 (11th Cir. 1984)[4]; **National City Bank v. Coopers and Lybrand**, 802 F.2d 990, 993 (8th Cir. 1986) (remand of federal question removal not subject to appellate review); **Federal Deposit Insurance Corp. v. Alley**, 820 F.2d 1121 (10th Cir. 1987) (even though remand order did not contain

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4 In rejecting appellate review, the Court noted:

> "Here, the district court judge did not expressly state that he was remanding because of §1447(c); nor, however, did he "state[] openly" that he was remanding on non-1447(c) ground for remand. In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir. 1978).

729 F.2d at p. 1293.

magic words "without jurisdiction", case nevertheless still not subject to appellate review); **Hernandez v. Brakegate, Ltd.**, 942 F.2d 1223 (7th Cir. 1991) (holding that 1447(d) applies to remand of removals "under § 1442 (federal officers), § 1442(a) (members of armed forces), or other statutes authorizing removal."); **In Re Adm'rs of the Tulane Educational Fund**, 954 F.2d 266 (5th Cir. 1992) (will not permit any kind of appellate review with regard to remand orders "predicated on a perceived lack of jurisdiction"); **Soley v. First Nat. Bank of Commerce**, 923 F.2d 406 (5th Cir. 1991)[5]; **In Re Bendectin Litigation**, 857

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[5] The Court explained the Congressional rationale for 1447(d):

> "Although 1447(d) seems fairly harsh, its purpose is to prevent delay through protracted litigation of jurisdictional issues. **Thermtron**, 423 U.S. at 351, 96 S.Ct. at 593. As recently explained by

F.2d 290, 300, 301 (6th Cir. 1988); **Ballard's Service Center, Inc. v. Transue**, 863 F.2d 447 (1st Cir. 1989); **Kunzi v. Pan American World Airways, Inc.**, 833 F.2d 1291 (9th Cir. 1987); **Vatican Shrimp Co., Inc. v. Solis**, 820 F.2d 674 (5th Cir. 1987) cert. den. 108

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the Ninth Circuit:

> 'Congress' concern that parties might use the appeal process to protract litigation over jurisdictional issues and thereby further delay litigation over the merits of the case reflects a balancing of competitive interests resolved in favor of judicial economy. The availability of a federal forum through the removal procedure had to be weighed against the interest of expeditious resolution of a dispute initiated in state court. Congress decided that in cases begun in state court, lengthy delays over jurisdictional issues are unacceptable. Consequently, the district court is the final arbiter of whether it has jurisdiction to hear the case.'
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> **Pellport Investors v. Budco Quality Theatres**, 741 F.2d 273 (9th Cir. 1984)."

923 F.2d at p. 408.

S.Ct. 345; **Black & Decker (U.S), Inc. v. Brown**, 817 F.2d 13 (3rd Cir. 1987) (remand for absence of jurisdiction not reviewable by mandamus or any other form of appellate review); **New Orleans Public Service, Inc. v. Majoue**, 802 F.2d 166 (5th Cir. 1986) and **In Re Shell Oil Co.**, 966 F.2d 1130, 1133 (7th Cir. 1992).

All of these cases make it clear that **Gravitt** has been consistently read by the courts of appeals to apply a total 1447(d) bar of appellate review of any kind - whether by mandamus, 1292(b) interlocutory appeal or by a **Cohen** collateral order appeal - with respect to 1447(c) remands for absence of subject matter jurisdiction. The Petitioners read all sorts of slants and nuances into the cases, in their desperate effort to portray a conflict among the circuit courts. But, in the final analysis, they

cannot get around the unimpeachable holding by the District Court in this case that the removal was based upon absence of subject matter jurisdiction.

Indeed, **Krangle** is right on point. Removal was effectuated on the basis of 28 U.S.C. 1442(a)(1); the district court remanded after determining that subject matter jurisdiction could not be maintained under that provision; the Court of Appeals stated:

> "Similarly, the district court's concern for the soundness of its decision does not justify creating an exception to section 1447(d). We have recognized that the strong congressional policies behind section 1447(d)'s bar of appellate review preclude review even of patently erroneous district court decisions. See **Hansen v. Blue Cross of California**, 891 F.2d 1384, 1387 (9th Cir. 1989); **Frumenti Development Corp**, 857 F.2d at 671 (petition to appeal remand order under section 1292(b) denied). Accordingly, the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is DENIED."

968 F.2d at p. 916. The Petitioners have

cited no case which conflicts with **Krangel**. Indeed, **Hernandez v. Brakegate**, supra, expressly supports it.

The closest the Petitioners come to creating any kind of conflict is with **National Audubon Society v. Dept. of Water**, 869 F.2d 1196 (9th Cir. 1988) and **In Re TMI Litigation Cases Consol. II**, 940 F.2d 832 (3rd Cir. 1991). In **National Audubon** the Court of Appeals held that it had "jurisdiction to review the remand order" as a 1292(b) appeal. However, the remand involved pendent state law claims. We have already discussed how, under **Cohill**, pendent state law claims may, in the discretion of the district court be remanded, but that such remands, because they are not within the purview of 1447(c), may be subject to appellate review. See 940 F.2d at 1205, 1206.

TMI litigation is a case that really

stands by itself. It proclaims the narrow holding that "1447(d) was not intended to preclude appellate consideration of a section 1292(b) certified question concerning the constitutionality of an Act of Congress" (in that case, the Price-Anderson Amendment Act of 1982), which had been used as the basis for removal. 940 F.2d at 838-848. The Court of Appeals traveled through a tangled web of rationalizations to reach its very strained conclusion.

But **In Re TMI**, aside from reaching a wholly incorrect conclusion, is totally inapplicable to this case for two very important reasons:

(A) The Court concluded that Congress did not intend to include questions of unconstitutionality of removal statutes within the purview of 1447(c) or, alternatively, did not intend,

through 1447(d), to preclude appellate review of such constitutional questions. 940 F.2d at pp. 845-847. Even if the Court were correct in that holding, it is clear that the District Court in this case did not remand because it believed that 1442(a)(1) was unconstitutional. It remanded because it believed that the cases of the civilian plaintiffs and their family members did not come within the purview of 1442(a)(1).

B. **TMI Litigation** expressly pretermitted the question of whether mandamus and/or **Cohen** appeal would be an appropriate vehicle for appeal, 940 F.2d at 848, nte.11, and simply exercised its discretion to accept a 1292(b) appeal. 940 F.2d at p. 848. In this case the Court of Appeals expressly exercised its discretion to reject the 1292(b) appeal certified by the District Court. A1-A3 of Petition.

The cases are legion that, if a court of appeals exercises its discretion to reject a 1292(b) appeal certified by the district court, that is the end of the matter and the appeal is over. **Coopers & Lybrand v. Livesay**, 437 U.S. 463, 98 S.Ct. 2454, 2461 (1978). ("The appellate court may deny the appeal [1292(b) appeal] for any reason, including docket congestion"); **In Re Convertible Rowing Exerciser Litigation**, 903 F.2d 822 (F.Circ. 1990) (holding that the petition for rehearing of an order denying permission to appeal under 1292(b) [entered by the court of appeals] was frivolous; the court of appeals has discretion that is similar to the certiorari discretion of the Supreme Court); **Klinghoffer v. S.N.C. Achille Lauro**, 921 F.2d 21, 24 (2nd Cir. 1990) ("The legislative history of section 1292(b) clearly shows this discretion [of

the court of appeals] encompasses denial of a properly certified appeal . . .for any reason, including docket congestion"); **Parcel Tankers, Inc. v. Formosa Plastics Corp.**, 764 F.2d 1153, 1156 (5th Cir. 1985) (the discretion of the court of appeals in determining whether tc accept an appeal under § 1292(b) is like the discretion of the Supreme Court in passing on a petition for certiorari; this discretion extends to vacating an earlier grant of leave to appeal when it appears to have been improvidently granted"); and **Nuclear Energy Co. v. Scott**, 660 F.2d 241, 245-247 (7th Cir. 1981) cert. den. 102 S.Ct. 1622.

Therefore, it is clear that, even if **TMI Litigation** was correct in its lonely view that 1292(b) overrides the prohibition of an appeal found in 1447(d)

(which it is not)[6], writ of certiorari

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6 The early case of **In Re Bear River Drainage District**, 267 F.2d 849 (10th Cir., 1959) provides an excellent discussion of why the Court in **TMI Litigation** was clearly wrong in concluding that 1292(b) appeals are available with regard to removal orders based upon 1447(c), despite the absolute prohibition contained in 1447(d):

> "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. While the generality of § 1292(b) might seem sufficient to encompass a remand order, it does not expressly either amend or repeal § 1447(d). Repeals by implication are not favored. The intention of Congress to repeal, modify or supersede must be clear and manifest. The earlier statute, § 1292(b), applies generally to 'a civil action' in which 'an order not otherwise appealable under this section' is made. As there is no express repeal or absolute incompatibility, the presumption is that the special statute is intended to remain in force. We are convinced that by the enactment of § 1292(b) Congress did not intend to abandon the long established policy expressed in § 1447(d)."

267 F.2d. at 851. See also **Nasuti v. Scannel**, 792 F.2d at 267, 268 (holding subsequently passed Federal Drivers Act did not create an exception to 1447(d)'s absolute prohibition against appellate

would still be improper in this case because the discretion exercised by the Court of Appeals below, in denying the 1292(b) appeal sought by the Petitioners, is immune from review and unimpeachable.

The Petitioners also argue that, since the District Court ruled that the cases of the military plaintiffs had been properly removed, the terms of 1447(c) and

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review; **Carnegie - Mellon v. Cohill**, (for its discussion of statutory construction, see 108 S.Ct. at 621, 622); **Hernandez v. Brakegate** (holding 1447(d) precludes appellate review of cases removed under 28 U.S.C. 1452; 942 F.2d at 1225, 1226); and **Mitchell v. Carlson** (holding that removals under the Westfall Act, 28 U.S.C. 2671, et seq. does not create an exception to the 1447(d) bar of appellate review; 896 F.2d at 131-134). **Connecticut Nat. Bank v. Germain**, 112 S.Ct. 1146 (1992) is, contrary to Petitioners' contentions, inapposite because it did not involve 1447(d), only 1292(b); § 158 of U.S.C., dealing with Bankruptcy Appeals, did not mention interlocutory appeals (1447(d) is about nothing but interlocutory appeals); and § 158(d) did not contain sweeping words found in 1447(d) such as "on appeal or otherwise."

1447(d) referring to "the case" and "a case" are somehow not applicable to a remand of only a portion of "a case". But this argument overlooks the express terms of 28 U.S.C. 1441(c) which expressly permits remands of only a portion of "a case". There is no doubt that the remand order with respect to civilian plaintiffs is subject to the terms of 1447(c) and 1447(d).

Thus, we point out again, there is no real conflict in the courts of appeal cases construing or applying 1447(d) to cases remanded on the ground of absence of subject matter jurisdiction. Again we say, the Petition filed by the Petitioners is frivolous and the Petitioners should be sanctioned for filing it.

II.

EVEN IF APPELLATE REVIEW WAS PERMISSIBLE IN THIS CASE, THE PETITION STILL SHOULD BE DENIED BECAUSE - WHETHER

APPELLATE REVIEW IS SOUGHT BY WAY OF MANDAMUS, 1292(b) APPEAL, OR COHEN COLLATERAL ORDER APPEAL - THIS CASE DOES NOT QUALIFY UNDER ANY OF THESE THREE METHODS OF APPELLATE REVIEW.

A. MANDAMUS IS ONLY VEHICLE FOR APPELLATE REVIEW OF NON-1447(C) REMAND ORDERS.

At the outset, we note that many courts have expressed or implied the view that "mandamus", not Cohen appeal or 1292(b) interlocutory appeal, is the only appropriate vehicle for seeking appellate review of a non-1447(c) remand order. **Thermtron** seems to make this rule clear, 96.S.Ct at 594[7], and many courts agree. **London v. United States Fire Insurance**

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[7] The Court stated:

"...this Court has declared that because an order remanding a removed action does not represent a final judgment, reviewable by appeal, '(t)he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done'."

96 S.Ct. at 594.

Co., 531 F.2d 257 (5th Cir. 1976);[8] **Corcoran v. Ardra Insurance Co. Ltd.**, 842 F.2d 31, 33-35 (2nd Cir.1988);[9] and

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[8] The Court noted:

> "First, as mentioned above the appellant in this case has taken an improper avenue of review, for the Supreme Court in **Thermtron** specifically held that mandamus rather than direct appeal is the only remedy to require the District Court to entertain the remanded action."

531 F.2d at p. 259.

[9] The Court observed:

> "Nonetheless, **Thermtron**'s explicit ruling that review must be by mandamus rather than appeal has recently been reinforced by **Cohill**, in which the Third Circuit's review by means of mandamus rather than appeal drew no criticism from the Supreme Court, see 108 S.Ct. at 617 & n. 4, in the face of the long established principle that mandamus is not appropriate where a direct appeal would lie, see, e.g. **Helstoski v. Meanor**, 442 U.S. 500, 505-08, 99 S.Ct. 2445, 2447-49, 61 L.Ed.2d 30 (1979); **Ex parte Rowland**, 104 U.S. (14 Otto) 604, 617, 2L.Ed. 861 (1882). Accordingly, we conclude that the remand order at issue in the present case is not appealable and may be reviewed only by petition for mandamus."

New Orleans Public Service, Inc. v. Majoue, 802 F.2d. 166 (5th Cir. 1986).[10] However, a later panel decision of the Fifth Circuit argued that, while mandamus may be the exclusive vehicle for review of non-1447(c) remand order based upon a statute or the discretion of the Court, when the basis is contractual the vehicle for review must be via a **Cohen** collateral order appeal, not by way of mandamus. **McDermott International v. Lloyds Underwriters of London**, 944 F.2d 1199, 1201-1204 (5th Cir. 1991).

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842 F.2d at p. 35.

[10] "The only vehicle for relief from a remand order is the writ of mandamus. A writ of mandamus lies only if the district court has affirmatively stated and relied upon a non-1447(c) ground for remand. **Royal**, 685 F.2d at 126; see also **Gravitt**, 97 S.Ct. at 1439; **In Re Weaver**, 610 F.2d 335, 337 (5th Cir. 1980)' **In Re Merrimack Mutual Fire Ins. Co.**, 587 F.2d 642 (5th Cir. 1978)."

802 F.2d at p. 167.

In any event, since this case does not involve a contractual basis for remand, the authorities are consistent in holding that mandamus would be the only basis for reviewing the District Court's remand order, if by some remote stretch of the imagination the order could be deemed a non-1447(c) order.

B. MANDAMUS.

This Court has outlined the criteria for issuing mandamuses in a number of decisions. See, e.g., **Moses H. Cone Memorial Hospital v. Mercury Const.**, 460 U.S. 1, 103 S.Ct. 74 L.E.2d 765, 927 (1983) and **Will v. Calvert Fire Ins. Co.**,437 U.S. 655, 98 S.Ct. 2552 (1978). Simply stated, the petition- ing party has the burden to "show that his right to the writ (of mandamus) is clear and indisputable." 103 S.Ct. at 938 and 98 S.Ct. at 2557. And this Court has held

that the "clear and indisputable" burden applies to mandamuses sought with regard to jurisdiction. **In Re Chicago R.I. & P. Ry. Co.**, 255 U.S. 273, 41 S.Ct. 288, 289 (1920) ("If the jurisdiction of the lower court is doubtful ... or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record ... or if the complaining party has an adequate remedy by appeal or otherwise ... the writ will ordinarily be denied").

The District Court in this case has made it patently clear that Petitioners cannot possibly meet their heavy burden to show that their right to a mandamus "is clear and indisputable". The Court explained its holding in the following language:

> "Although the case presents a close question, the defendants have not met the requirements of section 1442(a)(1).

> They are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. Although the defendants later produced and delivered Agent Orange under the control of federal officers, these subsequent acts are distinct from the earlier acts of product and manufacturing design being sued upon. The government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking."

A50 of Petitioners' Petition.

The Court then certified the case for interlocutory appeal and in so doing, stated that "there is a .....substantial ground for difference of opinion as to the appropriateness of defendants' attempt to remove under § 1442(a)(1)". See p. A56 of Petition.

Indeed, it is obvious that where there is a substantial ground for

difference of opinion about the controlling legal issues, no party can possibly argue that their right to mandamus is "clear and indisputable". Those two concepts are mutually exclusive.

Moreover, there are other aspects of the issues before the District Court which preclude a finding that Petitioners' right to mandamus is "clear and indisputable".

First, is the District Courts' ruling that the 1447(a)(1) ground for removal was properly before the Court. As we pointed out above, the Petitioners did not assert 1442(a)(1) as a ground for removal in the removal papers they filed within the time requirement for removal and sought to "amend" their removal papers to include 1442(a)(1) over a year after the state court suit was filed. The District Court's decision to permit such "amendment" is highly questionable.

The general rule relative to amendments of "removal petitions" has been well stated by Professor Wright:

> "The petition (for removal) may be amended freely prior to the expiration of the 30-day period for seeking removal. Thereafter, however, the cases indicate that the petition may be amended only to set out more specifically grounds for removal that already have been stated, albeit imperfectly, in the original petition; new grounds may not be added ...."

Wright, Miller and Cooper, Federal Practice & Procedure, § 3733, p. 537, 538; emphasis ours. This statement of law has been quoted and consistently applied by numerous cases from many federal districts and circuits. See **Kelly v. Carr**, 691 F.2d 800, 805 (6th Cir. 1980) (holding that removal petition could not be amended "after the action had been removed" to assert a federal question ground for removal); **Rockwell International v. U.S. Aircraft Ins. Group**, 823 F.2d 302 (9th

Cir. 1987) (the court refused to allow amendment of removal petition after removal in order to add defendant that would have created diversity, the court stating:

> "Second, the proposed amendment is not merely technical like the dismissal of a nonessential nondiverse party. The proposed amendment seeks more than the correction of 'defective allegations of jurisdiction,' a correction permissible under 28 U.S.C. 1653. The proposed amendment is not acceptable."

823 F.2d at 304); **Aetna Casualty & Surety Co. v. Hillman**, 796 F.2d 770, 774 (5th Cir. 1986); **Denton v. Wal-Mart Stores, Inc.**, 733 F.Supp. 340 (D.C. Fla. 1990); **Senter v. Sears, Roebuck & Co.**, 712 F.Supp 179 (D.C. 1989); **Barnhill v. Insurance Co. of N. America**, 130 F.R.D. 46 (D.C. S.Car. 1990); **Myers v. Connell**, 651 F.Supp. 273 (D.C. La. 1986); **Woodlands II v. City Savings & Loan Ass'n**, 703 F.Supp. 604, 607, 608 (D.C. Tex. 1989);

Bellone v. Roxbury Homes, Inc, 748 F.Supp 4344 (D.C. Va. 1990); **Garza v. Midland Nat'l. Ins. Co.**, 256 F.Supp. 12 (D.C. Fla. 1966); **Jacobs v. Director of Internal Revenue Service**, 217 F.Supp. 104 (D.C. N.Y. 1963) (may not amend "to claim different ground for removal"); and **United Gas Pipe Line Co. v. Brown**, 207 F.Supp. 139, 140, 141 (D.C. La. 1962) (new ground for removal not allowed by amendment).

Thus, at bottom the 1442(a)(1) issue should not have been addressed or decided by the District Court and, most certainly, for that reason writ of certiorari in this case is not appropriate.

Second, the District Court's determination that a corporation is a "person" within the meaning of 1442(a)(1) is also highly questionable. The District Court admitted that the federal Courts are heavily divided on the issue:

"The Supreme Court has held that section 1442(a)(1)'s use of the phrase 'person acting under' was not meant to include government agencies. **International Primate Protection League v. Administrators of Tulane Educ. Fund**, _U.S. ___, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991); see also **Mignogna v. Sair Aviation, Inc.**, 937 F.2d 37, 40-41 (2nd Cir. 1991) applying **Primate Protection League**). The Court did not decide, however, whether a corporation could be a 'person acting under [an officer]' **Bakalis v. Crossland Sav. Bank**, 781 F.Supp. 140, 142-43 (E.D.N.Y.1991). Federal courts are divided on the question. Compare **C.H. v. American Red Cross**, 684 F.Supp. 1018, 1023-24 (E.D. Mo.1987) ('person' in 1442(a)(1) refers to natural person") and **Roche v. American Red Cross**, 680 F.Supp. 449, 455 (D. Mass. 1988) (same) and **Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n**, 616 F.Supp. 1504, 1508-10(E.D. Wis. 1985) (same) with **Peterson v. Blue Cross/Blue Shield**, 508 F.2d 55, 58 (5th Cir.) ('person' not limited to natural person), cert. denied, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); **Bakalis**, 781 F.Supp. at 143-33 (same); **Group Health Inc. v. Blue Cross Ass'n**, 587 F.Supp. 887, 890 (S.D.N.Y. 1984) (same)."

A39 of Petitioners' Petition.

Thus, on that issue once again it cannot be said that Petitioners' position is "clear and indisputable".

Finally, the District Court concluded that the issue of whether the Petitioners were "acting under" a federal officer within the meaning of 1442(a)(1) is also a very close one. See A41-A48.

In sum, it is obvious that the contention by Petitioners that they can meet their burden of showing that their right to a mandamus is "clear and indisputable" is a frivolous contention.

C. 1292(B) INTERLOCUTORY APPEAL.

We have discussed above, in connection with our review of **T.M.I Litigation**, supra, how a grant of writ of certiorari cannot be based upon a 1292(b) appeal, because the Court of Appeals in this case exercised its unassailable discretion to reject such appeal.

Moreover, the Court of Appeals' action on the request for certification of a 1292(b) appeal is consistent with the rulings of almost all other courts who have passed upon the question of 1292(b) appeal in connection with remand orders. **Cohill**; **In Re Bear River Drainage District**; **Wright & Miller**; **Federal Practice Procedure** Sect. 3929, p. 135 (1292(b) appeals should be utilized "only in exceptional cases"); **Melahn**; **In Re Oximetrix, Inc.**, 748 F.2d 637 (F.Cir. 1984); **In Re Iowa Mfg. Co. of Cedar Rapids, Iowa**, 747 F.2d 462 (8th Cir. 1984); **Vatican Shrimp Co., Inc. v. Solis**, 820 F.2d 674 (5th Cir. 1987); **Bregman v. Alderman** and **Kunzi v. Pan American World Airways, Inc.**

Finally, we have discussed above how 1292(b) is not even a possible vehicle for appellate review of a remand order,

mandamus being the only possible one. In sum, it is clear that grant of certiorari on the basis of 1292(b) would be entirely inappropriate.

D. COHEN COLLATERAL ORDER APPEAL.

The criteria for a "**Cohen** collateral order appeal" have been set forth in **Coopers & Lybrand v. Livesay**, 437 U.S. 469, 98 S.Ct. 2454 (1978):

> "To come within the 'small class' of decisions excepted from the final-judgment rule by **Cohen**, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment...An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Fed. Rule Civ.Proc. 23(c)(1) Second, the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' **Mercantile Nat'l Bank v. Langdeau**, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523. Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named

> plaintiff or intervening class members. **United Airlines, Inc. v. McDonald**, 432 U.S. 385, 97 S.Ct. 2464, 54 L.Ed.2d 423. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case."

The remand order in this case is somewhat analogous to the class action order in **Coopers & Lybrand** and the situation is very much the same. The remand order is also a collateral order and not a final judgment. There is no question that the issues on the merits of this case's remand/removal matter - involving the Defense Production Act, military contractors' defense, whether the products were purchased off-the-shelf, the nexus between the state cause of action and the role of the federal defenses and the federal officers involved in the contract for, and the use of, the Agent Orange, and a multitude of other

factual and legal issues - "are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action." And finally, while the remand issue becomes somewhat moot after disposition in the state courts, this Court has gone out of its way to reaffirm principles of comity and federalism with regard to state court legal proceedings. **Texaco v. Pennzoil**, 107 S.Ct. 1519 (1987) and **Chick Kam Choo v. Exxon** 108 S.Ct. 1684, 1690, 1691 (1987) (in both of these cases this Court stated that the Texas courts are presumed competent to resolve trials on the merits in cases such as this one, even where federal defenses are involved).

Thus, aside from the absolute prohibition in 1447(d), the Court of Appeals was eminently correct in this case in dismissing the Petitioners' direct appeal and in rejecting their effort to

bring about appellate review of the remand order on the basis of the **Cohen** collateral order doctrine. See also, **Calderon v. Aerovias Nacionales de Colombia**, 929 F.2d 599 (11th Cir. 1991) (dealing with the "matter of substantive law" exception, as it relates to a remand order); **Pelleport Investors v. Budco Quality Theatres**, 741 F.2d 273 (9th Cir. 1984) (discussing how the collateral order doctrine can potentially apply only in non-1447(c) cases and seemingly limiting the **Pelleport** doctrine to contractual cases); **Survival Systems Div. of the Whittaker Corp., et al v. U.S. Dist Ct. For Southern District of California**, 820 F.2d 1416 (9th Cir. 1987) (discussing how pendent claims or claims not independently removable, may, in the discretion of the district court, be remanded, once the federal claim upon which removal is based is gone, and such

discretionary remand is not subject to attack on appeal, either by way of mandamus or of the collateral order rule); **Bregman v. Alderman** (rejecting direct appeal of remand order); **Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev.**, 838 F.2d 656 (2nd Cir. 1988) impliedly limiting collateral order direct appeals vis-a-vis remand orders to those outside 1447(c) and to orders such as those based upon a forum selection clause); **National City Bank v. Coopers and Lybrand**, 802 F.2d 990 (8th Cir. 1986) (again limiting the collateral order doctrine to non-1447(c) matters); **Ochoa Realty Corp. v. Faria**, 815 F.2d 812 (1st Cir. 1987) (rejecting collateral order appeal with respect to remand order); **Black & Decker (U.S.) Inc. v. Brown**, 819 F.2d 13 (3rd Cir. 1987) (rejecting direct appeal) and **Fed. Deposit Ins. Corp. v.**

Alley, 820 F.2d 1121 (10th Cir. 1987) (rejecting direct appeal).

CONCLUSION AND PRAYER

Since the District Court remanded on the basis of absence of subject matter jurisdiction, this is a frivolous appeal. The Petitioners have not, and cannot, avoid the fatal judicial impact of § 1447(d) and **Gravitt v. Southwestern Bell Telephone**.

But even if there were no such thing as 1447(d), for the reasons we have discussed above, appellate review cannot be obtained in this case, whether by way of mandamus, 1292(b) or pursuant to the **Cohen** collateral order doctrine.

In 1897, this Court affirmed the policy, now incorporated into its rules, of limited discretionary review of petitions for writ of certiorari, stating that the "power (to grant certiorari). . .

. will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." **Forsythe v. Hammond**, 166 U.S. 506, 17 S.Ct. 665, 668, 669 (1897).

There is no real conflict among the courts of appeal on the essential issues in this case. In fact, the law is "clear and indisputable" that Petitioners are not entitled to any relief in the appellate courts and that the civilian plaintiffs must be allowed to proceed with their cases in the state court of Texas, without any further frivolous hindrances by the

Petitioners.

Respondent White hereby respectfully prays this Court to deny the Petition for Writ of Certiorari.

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APPENDIX A

SECTION 1441(c) OF TITLE 28 OF THE UNITED STATES CODE

Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Supreme Court, U.S.
FILED
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No. 92-438

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, *et al.*,

Petitioners,

-against-

CHARLES BROWN and JAMES WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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No. 92-438

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE DOW CHEMICAL COMPANY, *et al.*,

Petitioners.

v.

CHARLES BROWN and JAMES WHITE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

In another case involving the right to a federal forum under 28 U.S.C. § 1442—the same right petitioners claim here—the United States argues that "appellate review is necessary to prevent irretrievable loss of this federal right." *See* p. 5, *infra*. Because the United States' position solidly supports appellate review here, petitioners request that the Court invite the United States to express its views on certiorari.

ARGUMENT

The Court Should Solicit the Views of the United States Regarding Certiorari, Because the United States Contends that an Order Remanding for Lack of Subject Matter Jurisdiction Under 28 U.S.C. §1442 May Be Reviewed on Appeal Consistent with 28 U.S.C. § 1447(d).

In briefs filed in the United States Court of Appeals for the Sixth Circuit, the United States argues that, where jurisdiction is claimed under 28 U.S.C. § 1442 (as petitioners claim in this case), an order remanding to state court for lack of subject matter jurisdiction may be reviewed on appeal. *See* Brief for the United States as Amicus Curiae Supporting Trooper Wright dated August 21, 1991 ("U.S. Brief"), Supplemental Materials at Tab A, and Supplemental Brief of the United States as Amicus Curiae before the En Banc Court dated August 31, 1992, ("U.S. Supp. Brief"), Supplemental Materials, Tab B, filed in *Miami County Municipal Court v. Wright*, No. 91-3615, 1992 WL 92353 (6th Cir. July 30, 1992) (panel opinion withdrawn and rehearing en banc granted), Supplemental Materials, Tab C.[1]

In *Wright*, a state trooper had seized $12,000 as suspected drug proceeds. The federal Drug Enforce-

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[1]The briefs of the United States and the unpublished opinions in *Wright* have been lodged with the Court as Supplemental Materials. Petitioners learned of the withdrawal of the panel opinion in *Wright* on the eve of filing their petition for certiorari, and so deleted discussion of that opinion from their petition. Petitioners learned of the views expressed by the United States as amicus curiae in *Wright* after their petition for certiorari had been filed.

ment Agency ("DEA") adopted the seizure pursuant to 21 U.S.C. § 881 and took possession of the funds. A state judge ordered the state trooper to return the funds, and, when the DEA refused, had the trooper arrested and charged with contempt.

The state trooper removed the case to federal court under 28 U.S.C. § 1442(a)(1), arguing (like petitioners below) that he was "acting under" a federal officer. The district court remanded the case for lack of subject matter jurisdiction, finding that there was no jurisdiction under § 1442 because the trooper had failed to allege a colorable federal defense as required under *Mesa v. California*, 489 U.S. 121 (1989). *State of Ohio v. Wright*, No. C-3-88-096, 1992 WL 123194 (S.D. Ohio May 12, 1990), Supplemental Materials, Tab D.

On appeal, the United States as amicus curiae argued that the court of appeals had appellate jurisdiction despite the remand for lack of subject matter jurisdiction because the remand order was based on "a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." U.S. Brief at 12, *quoting Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). Because the district court's "substantive decision" that the trooper's asserted federal defense was insufficient might be applied against him in the state proceeding on remand, the remand order was not limited "to just matters of jurisdiction." Thus, the United States concluded that appellate review of the remand order was proper, consistent with 28 U.S.C. § 1447(d), *citing City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) (predecessor of § 1447(d) did not bar appellate review of dismissal of

party which resulted in remand for lack of subject matter jurisdiction).

In this case, as in *Wright*, the District Court addressed federal defenses implicating important federal interests: immunity of government contractors under the Defense Production Act and the government contract defense and preemption under the Federal Insecticide, Fungicide, and Rodenticide Act. *See, e.g.*, A33-A37. Petitioners, like the trooper in *Wright*, are faced with at least a risk of preclusion[2] and thus are similarly entitled to appellate review under the United States' reading of § 1447(d). *See* U.S. Brief at 12 (appellate review of remand order available consistent with § 1447(d) if decision on federal defense "may" be given preclusive effect).

Congress intended for the right to a federal forum under § 1442 to be interpreted broadly. U.S. Supp. Brief at 15. The United States stressed the importance of the right to a federal forum for persons "acting under" federal officers:

> The very "purpose of * * * the federal officer removal statute, was to provide a federal forum in any case where a federal official might raise a defense arising from his official duties, and to permit any state law question to be tried upon the merits in an environment free of local interests or prejudice."

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[2]While the District Court's statements regarding the nature and scope of the federal defenses should be given no preclusive effect against petitioners on remand to state court, respondents can be expected to argue some theory of preclusion.

U.S. Brief at 11, *quoting Kentucky v. Long*, 837 F.2d 727, 750 (6th Cir. 1988). This right to a federal forum must be protected by a right to immediate appeal for the same reasons that this Court allowed immediate review of orders denying federal employees absolute or qualified immunity from civil suits. U.S. Brief at 13, *citing Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). The United States thus concluded that "[a]ppellate review is necessary to prevent irretrievable loss of this federal right." *Id.*

In view of the United States' confirmation of the important federal interest in appellate protection of the right to a federal forum under § 1442, this Court should invite the United States to express its views on this petition for certiorari. This conclusion is reinforced by petitioners' argument that review is available by certification under 28 U.S.C. § 1292(b), an option not available in *Wright*. Having argued in *Wright* that review was available both under the collateral order doctrine and the All Writs Act,[3] the United States may also view appellate review of remand orders under § 1292(b) as an appropriate additional means of protecting the right to a federal forum under § 1442 and as the proper accommodation of the seeming conflict between § 1292(b) and § 1447(d).

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[3]The United States concluded that the remand order "is an appealable collateral order pursuant to 28 U.S.C. 1291." U.S. Brief at 13. In the alternative, the United States argued that the remand order could be reviewed under the authority of the All Writs Act, 28 U.S.C. § 1651, *citing Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571 (4th Cir. 1989). *Id.* at n.8.

Petitioners here claim the same right under § 1442 as the state trooper claimed in *Wright:* a right as persons "acting under" federal officers to have their federal defenses heard in a federal forum. The United States squarely supports that right and contends that the right to a federal forum must and can be protected by appellate review of remands to state court, consistent with § 1447(d).

CONCLUSION

Accordingly, the Court should invite the United States to express its views regarding the questions presented for certiorari, and the writ of certiorari should be granted.

Dated: Uniondale, New York
November 20, 1992

Respectfully submitted,

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